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No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1997

FORD MOTOR COMPANY, PETITIONER

v.

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,
RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents Samuel Foster, who is black, and Dee-Witt Sperau, who is white, purchased the assets of a Ford dealership in Selma, Alabama, from the widow of the prior dealer. After the dealership failed, they sued Ford. The jury held Ford liable and imposed $6 million in punitive damages on the theory that Ford had committed fraud by (i) failing to disclose to respondents that minority-owned dealerships, as a group, are not as successful as white-owned dealerships and (ii) failing to take Foster's race into account in setting the capitalization requirement for the dealership and in projecting its sales and profits. After remand from this Court for further consideration in light of *BMW of North America, Inc. v. Gore,* 116 S. Ct. 1589 (1996), the Alabama Supreme Court abandoned the race-based theory on which the case was tried and upheld $1.8 million in punitive damages on the theory that Ford committed fraud by providing an unduly optimistic sales and profit forecast in light of respondents' status as new dealers and the performance history of the prior owner of the dealership. In the course of so ruling, the court expressly found that Ford's motivations were benevolent, not malicious. The questions presented are:

1. Whether, in sustaining liability on the basis of a theory that was not presented to the jury, the Alabama Supreme Court deprived Ford of due process.

2. Whether, in view of the Alabama statute that limits punitive damages to those fraud cases in which the defendant intended to cause injury, the imposition of punitive damages in this case, where the court found no intent to injure respondents, deprived Ford of its due process right to notice of the kind of conduct that could subject it to punishment.

3. Whether, in light of the absence of any intention on the part of Ford to injure respondents, or any profit to Ford from the "fraud" in this case, punitive damages of $1.8 million are so excessive as to violate due process.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company (hereinafter "Ford")[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App. A, *infra*, 1a-31a) is not yet reported. That court's original opinion (App. B, *infra*, 32a-66a) is reported at 674 So. 2d 24. The order of the Circuit Court of Lowndes County (App. C, *infra*, 67a-75a) is unreported.

JURISDICTION

The decision of the Supreme Court of Alabama on remand was rendered on September 5, 1997 (App., *infra*, 1a), and a timely application for rehearing was overruled on January 23, 1998 (App. D, *infra*, 76a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

ALA. CODE § 6-11-20 provides in pertinent part:

> (a) Punitive damages may not be awarded in any civil action * * * other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. * * *
>
> (b) As used in this article, the following definitions shall apply:
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> (1) Fraud. An intentional misrepresentation, deceit, or concealment of a material fact the

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[1] Ford Motor Company's Rule 29.6 statement is set forth at App. E, *infra*, 77a-78a.

concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.

STATEMENT

Respondents Dee-Witt Sperau (who is white) and Samuel Foster (who is African-American) are sophisticated businessmen who wanted to own a Ford dealership and whom Ford considered to be promising dealer candidates. Ford identified for them a successful dealership in Selma, Alabama, which had become available when the dealer died. Respondents performed a thorough investigation of the dealership, reached an agreement to purchase it from the widow of the dealer, and were approved as Ford dealers. The dealership earned a substantial profit during its first year, but subsequently declined and ultimately failed.

Respondents sued Ford, alleging that Ford had committed the tort of fraudulent "suppression" by failing to disclose data about the historical performance of black dealers as a whole and that, in view of this data, Ford had committed a fraudulent misrepresentation by stating that the racially-neutral financial forecasts it had supplied to them were "reasonable." The jury found Ford liable for fraud, awarding substantial compensatory damages and $6 million in punitive damages. The Alabama Supreme Court affirmed the judgment, but this Court vacated and remanded for further consideration in light of *BMW of North America, Inc. v. Gore,* 116 S. Ct. 1589 (1996). On remand, the Alabama Supreme Court reduced the punitive damages to $1,792,000 on the basis of a theory that was not presented to the jury — that the forecasts were misleadingly optimistic given the performance history of the prior dealer and respondents' status as new dealers.

The questions presented in this petition are (1) whether the Alabama Supreme Court's use of a new theory, not presented to the jury, to support fraud liability violated Ford's right to due process; (2) whether the imposition of punitive damages, despite the lack of evidence that Ford's alleged fraud was committed "with the intention * * * of thereby depriving [respondents] of property or legal rights or otherwise causing injury" (ALA. CODE § 6-11-20),

violated Ford's due process right to fair notice of the kind of conduct that is subject to punishment; and (3) whether the amount of punitive damages is unconstitutionally excessive.

1. ***Ford's Minority Dealer Program.*** Ford established its Minority Dealer Program in the 1960s to overcome barriers experienced by members of minority groups to becoming Ford dealers. App., *infra*, 35a; R. 1445.[2] Under that program, to which it devotes over $50 million per year (R. 2253-2255, 2386, 2438), Ford provides special opportunities and assistance to minority candidates who are interested in becoming Ford dealers.

Most relevant for purposes of this case, when the owner of a dealership seeks Ford's assistance in locating a buyer (as was the case here), Ford will attempt to identify qualified candidates who can raise on their own the funds necessary to purchase and operate the dealership (as opposed to individuals who, though qualified, cannot raise the needed funds without assistance from Ford). R. 1729.[3] Indeed, if the dealership is a successful one, its prior owner is likely to insist that the candidates be able to finance the acquisition with private capital. *Ibid.* In furtherance of its objective of increasing the number of successful minority dealers, Ford makes a priority of identifying minority candidates for these "private capital" dealerships, particularly those with a history of

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[2] The designation "R. __" refers to the Reporter's Transcript of the trial below. The designation "C. __" refers to the Clerk's Record, which is comprised of pleadings, motions, briefs, and trial exhibits.

[3] Ford also has a Dealer Development program under which it provides financial assistance to otherwise qualified candidates who lack sufficient private capital to acquire a dealership. The program, which has been in existence since 1950 and which recently has been made available principally to members of minority groups, allows candidates to operate Ford-owned dealerships for a year without risk to their personal funds and then to either withdraw or use the profits generated from the dealership to gradually buy out Ford's stake and ultimately become the full owner. App., *infra*, 35a-36a; R. 1582-1583, 1732-1734, 1941-1942. The Selma dealership was not part of the Dealer Development program.

healthy profits. R. 1535, 1586, 1603-1604, 1807-1808, 2288.[4] And once a member of a minority group purchases a dealership with private capital, Ford makes available to that dealership a range of benefits, including special training, assistance from consultants, reimbursement for "launch costs" (which include the costs of cleaning up and/or renovating the dealership, purchasing new signs, changing stationery, etc.), and a special parts return policy whereby Ford pays the dealership in full for obsolete or otherwise unwanted parts that are in its inventory. App., *infra,* 35a; R. 1473-1474, 1544-1548, 1586-1588, 1810, 1937-1940, 1942, 2283-2284.

2. ***The Events Leading up to Respondents' Acquisition of the Selma Dealership.*** Respondent Samuel R. Foster, II, is a sophisticated African-American entrepreneur, who has a college degree in business administration (R. 261-263). In 1987, Foster was operating a construction company in Charlotte, North Carolina. App., *infra,* 1a, 38a; R. 268-272, 1219-1220. He also was serving on the Board of Trustees of his *alma mater,* the University of South Carolina. R. 288-289. As a result of social contacts with a black Ford employee, Cornelius Willingham, Foster was identified as a promising candidate to participate in Ford's Minority Dealer Program. App., *infra,* 1a, 38a; R. 277, 382-386, 1503-1505, 1508-1509.

Subsequently, Foster met with Ken Cooper, Ford's Market Representation Manager for the Charlotte District Sales Office, and was given a dealership application to fill out. App., *infra,* 38a-39a; R. 278, 282, 387, 389, 391-393. When Foster submitted the application, Cooper discussed with him the need for a partner with experience in the automotive industry. App., *infra,* 1a, 39a; R. 393-394. Cooper offered to help Foster find a partner. R. 282-283, 284-285. Foster ultimately did not pursue Cooper's offer because an employee of Foster's — respondent Dee-Witt Sperau

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[4] Ford cannot unilaterally select a replacement for an existing dealer. The most it can do is assist the existing dealer in finding a buyer if the dealer requests assistance. R. 1449, 1588-1590. Importantly, Ford receives no franchise fee or other remuneration when it assists in finding a purchaser for an existing dealership (nor, for that matter, when it places a dealer candidate in a new location). R. 1809, 2237-2238.

(who is white) — was willing to join Foster in the venture. Sperau had several years of experience in the automotive industry, both in Ford's employ and at three Ford dealerships. App., *infra,* 1a-2a, 39a; R. 287, 435-436.

Don Kitchens, the Atlanta District Market Representation Manager, and his superiors were impressed by the two men's resumes and invited them to a meeting in Atlanta. App., *infra,* 39a; R. 1595-1596, 1821, 1823-1824. At that meeting, Foster and Sperau made a favorable impression on the Ford personnel, who found them to be articulate and to present themselves well. App., *infra,* 40a; R. 1596-1597, 1827.

Shortly after the meeting, Kitchens called Foster to inform him that the widow of a dealer in Selma, Alabama, wanted to sell the dealership. Kitchens invited Foster and Sperau to a second meeting in Atlanta to discuss the Selma dealership. App., *infra,* 40a; R. 293-294, 412-413. At that meeting, Kitchens and his supervisors, District Sales Manager Bill Stang and Assistant District Sales Manager Dale Wendell, expressed the opinion that the Selma dealership was a good one that Foster and Sperau should investigate. R. 294. The Ford employees considered the Selma dealership to be an excellent opportunity because it already was very profitable, market analysis suggested that it had room for additional growth, and it had an experienced staff (including a respected general manager) that was committed to remaining at the dealership. R. 1602-1609.

On February 22, 1988, Kitchens called Foster to provide additional information about the Selma dealership and reaffirm his opinion that it should continue to be profitable. R. 295-297, 417-418, 1831-1832. Kitchens then faxed to Foster a sales and profit forecast for the dealership. App., *infra,* 2a, 40a; R. 298-299, 306, 418-419, 956. Sales and profit forecasts, which are routinely prepared as part of the process of appointing a dealer, contain projections of costs, sales, profits, capital required to operate the dealership, and return on capital. These forecasts are not guarantees of future performance because, in preparing them, Ford cannot account for factors that are out of its control, such as the diligence and prudence of the dealer, changes in the regulatory environment, and future economic conditions. R. 1451-1452,

1838-1839, 1915-1916. Typically, an initial forecast is prepared as soon as a dealership becomes available and before Ford becomes aware of the identity of the potential replacement dealer. R. 806, 840-841, 1839-1840.[5] The forecast sent to Foster and Sperau was of this type; it did not take into account the two men's specific plans for operating the dealership. R. 841-842, 1839-1840. *See also* R. 1525-1526.

On February 25, 1988, Foster and Sperau visited the dealership. App., *infra,* 2a; R. 419-420, 955-956. They were accompanied by Ronald Bortnick, a friend of Sperau's with over 20 years experience in the automotive industry, who owned a successful Ford dealership in Maryland. App., *infra,* 40a; R. 299, 422, 437-438, 957. That night, Foster and Sperau called Kitchens to inform him that they had decided not to pursue the dealership. App., *infra,* 2a, 40a; R. 300-302, 424-425, 445-446, 960. Nonetheless, the very next day they "worked up a complete Ford operations outline" for the Selma dealership. R. 1031-1035.

Several days later, Kitchens sent Foster a revised sales and profit forecast, which, unlike the initial forecast, took into account Foster's and Sperau's plans for operating the dealership. App., *infra,* 2a, 40a-41a; R. 961-962, 1840-1845, 1861-1862. *See also* R. 1527-1530. However, the revised forecast, like the initial one, took no account either of the fact that Foster is black or of the fact that Sperau is white; it is the race-neutral quality of the forecast that formed the basis at trial for respondents' claims against Ford.

The revised forecast reduced the capital the men would be required to invest from $632,000 to $535,000. App., *infra,* 2a,

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[5] In preparing an initial forecast, Ford takes into account both the historical data on the dealership — sales, costs, market share, profits, capital invested, etc. — and group averages — *i.e.,* how similarly sized dealers in that district have fared. After Ford has identified specific candidates for the dealership, the forecast may be revised with input from the candidates to take into account their strengths and weaknesses and their plans for operating the dealership. Thus, depending upon the characteristics of the particular dealership candidates, there could well be two or more very different forecasts for the same dealership. R. 807-810, 1525-1530, 1834-1845, 1950-1951, 2231-2232.

40a; R. 304. This new estimate remained on the conservative side, however, being $187,000 higher than the prior dealer's capital investment. R. 1848. The $97,000 reduction in the capital requirement had the effect of increasing the estimated return on capital from 46.2% in the first year and 56.6% in the second year to 51.2% and 65.4%. App., *infra,* 2a, 40a; R. 304. Still, the revised projected return remained below the 70% return earned by the existing dealer in 1987. R. 1847.

Foster and Sperau reviewed the new forecast carefully and discussed the revised figures with both Kitchens and Bortnick. App., *infra,* 40a-41a; R. 304-306, 451-453, 962-963. Kitchens explained to the men that in the revised forecast he had concluded, based on their plans for operating the dealership, that they would need less money for the acquisition of used vehicles than was projected in the first forecast. App., *infra,* 40a-41a; R. 1038-1039, 1842-1844. He accordingly had reduced the projected capital requirement for used vehicles from $268,000 to $231,000. This remained a conservative figure when compared to the less than $120,000 that the prior dealer had set aside to purchase and resell the same number of used vehicles. R. 1842-1843. Kitchens also believed that, because Sperau intended to implement the Automated Inventory Management System ("AIMS"), which would enable the dealership to keep a smaller parts inventory on hand, less money would be needed for parts than originally estimated. App., *infra,* 41a; R. 1041-1042, 1075-1076, 1844-1845. The revised forecast thus reduced the projected capital requirement for parts from $133,000 to $96,000. Nevertheless, this too was a conservative figure: the prior dealer, who had never automated the dealership's parts department, had only $67,000 worth of parts. R. 1844-1845.

Sperau returned to the dealership several times, conferred with the general manager, discussed the dealership's methodology for determining the inventory of parts needed, and investigated the dealership's historical sales data for new and used vehicles as well as for parts. R. 1042-1045, 1087-1088. He also checked Kitchens' forecast for new car sales against the Polk Registrations, a listing of registered vehicles by market area and manufacturer. R. 1059-1060.

Ultimately, having independently determined that the reduction of the cost for parts was consistent with the dealership's data and that the estimates for new and used car sales were in line with the dealership's data and the Polk Registrations, Sperau indicated his satisfaction with the accuracy of the revised forecast. R. 452-453, 1042-1044, 1059-1060. The two men then signed the forecast directly beneath the following admonition: "***Forecast Sales and Profits are believed to be reasonable but cannot be guaranteed. Actual results will depend on managerial ability and future business conditions.***" C. 4897 (emphasis added); App., *infra*, 47a. When they signed the document, Foster and Sperau understood precisely what this statement meant. R. 454-459, 500-501, 1045-1047, 1851-1852.

On March 11, 1988, Foster and Sperau entered into a Buy/Sell agreement with the widow of the Selma dealer. App., *infra*, 41a; R. 312-313. On May 11, 1988, the two men signed the documents necessary to acquire the assets of the dealership, consummate the lending arrangements with Ford Credit, and obtain Ford's final approval to operate the dealership. R. 334. One of the documents was a Capital Loan Security Agreement with Ford Credit, which had agreed to lend the dealership $285,000 of the capital requirement as well as $1,000,000 for new vehicle inventory. App., *infra*, 41a; R. 721-722; C. 4257.[6] Among other things, the agreement obligated Foster and Sperau to leave 90% of the profits in the dealership until the dealership's net assets equaled or exceeded $570,000. C. 4918.[7] In addition, the agreement limited Sperau's annual salary to $48,000 and permitted no salary for Foster, who was not expected to be involved in the day-to-day operations of the dealership. *Ibid.*; R. 503-504, 742-743. The

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[6] As a condition of making the $285,000 capital loan, Ford Credit insisted that the men raise an equal amount from other sources, thereby increasing the total capitalization of the dealership to $570,000 — $35,000 more than the projected capital requirement and $222,000 more than the amount invested by the prior dealer. *See* R. 1848.

[7] In a March 8, 1990 amendment to that document, Sperau and Foster agreed to leave in the dealership ***all*** profits other than those needed to pay tax liabilities on gross profits. C. 4962.

salary permitted for Sperau was twice the amount used in the sales and profit forecast. *See* C. 4172. It also was twice the prior owner's salary. *See* R. 503.

3. ***Respondents' Mismanagement of the Dealership and its Ultimate Demise.*** On May 11, 1988, the dealership began operations under the name River City Ford. App., *infra,* 42a. Under its Minority Dealer Program, Ford provided the dealership with financial assistance. For instance, River City Ford requested and received reimbursement for launch costs in the amount of $19,800. *Id.* at 35a n.4; C. 4929-4932; R. 491, 894-895, 1637-1638. It also requested and received a $44,116.52 supplemental parts return. App., *infra,* 35a n.4; C. 4959-4960; R. 490-491, 1546-1547.

In the late spring and summer of 1988, Sperau operated the dealership while Foster remained in Charlotte to run his construction business, making only sporadic trips to Selma. R. 346. On September 30, 1988 — only four months after the new owners took over the dealership — Foster sent a letter to Ford Credit requesting approval of a monthly salary of $2,500 — *i.e.,* $30,000 per year. R. 363-364, 505-506; C. 4483. Because the dealership was profitable at that time, Ford Credit approved the request. R. 364, 508, 749, 767. Meanwhile, Sperau was taking a salary of $60,000 per year — *i.e.,* $12,000 above the agreed limit and $36,000 above the amount used in the sales and profit forecast — without Ford Credit's approval. R. 1091; C. 4989 (indicating wages of $59,176.04 for 1989). In addition, Sperau's wife Diane was taking a salary — $7,500 for two months work in 1988 (R. 1206-1207) and $12,000 for 1989 (C. 4990). In sum, Foster and the Speraus were together taking over $100,000 per year in salary — more than four times the salary received by the prior dealer and assumed in the forecast.

Later in the fall of 1988, Foster disclosed to Sperau for the first time that he was facing catastrophic tax liability arising out of the operation of his construction business. R. 352, 509, 1099. The IRS had imposed tax liens totaling $116,000 against Foster because, as sole owner of the construction business, he had failed to pay over to the IRS substantial amounts withheld from his employees' paychecks for income tax and social security. He also

had failed to remit required amounts of unemployment tax. R. 514-531.[8]

Because Foster himself could not raise the funds to pay off the tax lien and because the IRS could have executed against Foster's share of the dealership, Sperau agreed to borrow the necessary funds from his lender. R. 353, 536-537, 1141. That loan exhausted Sperau's borrowing capacity, thereby preventing him from obtaining additional capital for the dealership. R. 1897-1898.

Foster executed a note in favor of Sperau for part of the amount owed ($83,840). C. 4938. The note obligated him to a repayment schedule of $2,100 per month. R. 990-991. To meet that obligation, Foster began taking a draw of $2,100 per month from River City Ford. R. 586-587.[9] Sperau gave Foster the remainder of the amount due the IRS in exchange for 12% of the shares of the dealership — increasing Sperau's interest to 56% and decreasing Foster's to 44%. R. 353-354, 537-538, 558-559, 1102; C. 4501.

Beginning in that first year and continuing until the business was closed, Sperau and Foster charged substantial amounts of entertainment and other expenses to the dealership as business expenses and used their drawing accounts and employee accounts freely and lavishly for personal expenses.[10] Among other things,

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[8] Although much of his debt to the IRS had arisen before he began pursuing a dealership, Foster failed to disclose this massive potential liability to Ford or Ford Credit on the financial forms he filled out for each of them. R. 513-531, 1631-1633, 1829-1830.

[9] Initially, this amount was on top of the $2,500 per month salary. Eventually, however, Foster terminated the $2,500 per month salary. R. 990.

[10] A drawing account is a means by which an owner of a dealership can use dealership funds to pay personal expenses. When the owner charges an expense against his or her drawing account, that amount is deducted from his or her share of the profits. R. 978-979, 1095. Of course, if the dealership is not earning any profits, any amounts charged to a drawing account necessarily erode the dealership's capital.

(continued...)

they used dealership funds to pay legal fees for the closing on Sperau's house; interior decorator fees for Sperau's house; a senior class trip and a graduation party for Sperau's son; college tuition for Sperau's son; cars for Sperau's sons and Foster's mother; gasoline, maintenance, and repairs for those cars; docking and fuel expenses for Sperau's boat; expensive hotels and restaurants throughout the country; nights on the town with dealership employees; a membership for Sperau in a racially restricted country club that Foster could not join; clothing; and dog kennel expenses. R. 587-592, 1109-1138, 1153-1155; C. 4442, 5057-5067.

During its seven months of operation in 1988, River City Ford earned profits of $102,682. App., *infra*, 2a, 42a; R. 585, 982. The two men's profligate spending habits began taking their toll, however, for they were outspending the considerable sums the dealership was bringing in. As a result, in 1989, despite posting new vehicle sales of $4,689,041 and parts sales of $436,108, the dealership reported a loss of $4,124. App., *infra*, 2a, 42a; R. 982, 987-988. In 1990, despite new vehicle sales of $4,689,114 and parts sales of $407,188, the dealership reported a loss of $6,347. *Ibid*. During this time, Ford Credit personnel repeatedly told Sperau and Foster in writing and orally that they were taking more money out of the dealership (in salaries and through their drawing accounts) than was permitted under the Capital Loan Security Agreement. R. 775, 777; C. 4296-4297, 4320, 4951.

In January 1991, the dealership went "out of trust" by $130,000 — *i.e.*, it sold vehicles financed by Ford Credit and failed to use the proceeds to repay the debt, as required by the inventory financing arrangement. App., *infra*, 42a; R. 996-997, 1162-1163. The dealership subsequently filed for protection under the bankruptcy laws. App., *infra*, 2a, 42a; R. 998.

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[10] (...continued)

An employee account is used for advances against salary. R. 1107-1108. At the time the dealership closed, Sperau had run up an unpaid balance of $84,000 (*i.e.*, close to twice the $48,000 ***gross*** annual salary to which Sperau was limited under the agreement with Ford Credit) on his employee account. R. 1108-1109.

4. ***Prior Proceedings.*** Sperau, Foster, and their wives filed a complaint against Ford, Ford Credit, and Ford Credit employee Gary Birdsong alleging fraud, conspiracy, and breach of contract. Ford Credit filed a counterclaim against all plaintiffs for the monies owed to it. The case went to trial on March 29, 1993 and ended in a hung jury. App., *infra,* 32a-33a.

After the trial court granted summary judgment against the wives on their claims (C. 3821), the retrial commenced on February 14, 1994. At the close of plaintiffs' case, the court granted the defendants directed verdicts on the breach of contract claim as well as on the plaintiffs' claim that Ford personnel had misrepresented that the "vast majority" of minority dealers were successful. R. 1421, 1429-1430. Finally, the court directed a verdict in favor of Ford Credit and Birdsong on all aspects of plaintiffs' fraud claim. R. 1429. At the close of all the evidence, the court granted a directed verdict in favor of all defendants on the conspiracy claim. R. 1977. The case thus went to the jury only on the two men's "fraud and suppression claims [against Ford] in connection with the capitalization and the sales and profit forecasts" (*ibid.*) and Ford Credit's contract claim against Foster, Sperau, and Mrs. Sperau. App., *infra,* 33a-34a.

As submitted to the jury, the misrepresentation and suppression claims were predicated upon the theory that the race of the dealer is relevant to a dealership's likelihood of success and that Ford's failure to take race into account when discussing a potential dealership with an African-American is fraudulent. Thus, ignoring the fact that the dealership was operated by Sperau, who is white, respondents' expert insinuated that Ford had committed fraud by not imposing a higher capitalization requirement on the men because black dealers (allegedly) have had a higher failure rate than white dealers. R. 1255-1284, 1307-1309, 1317-1320. In addition, consistent with this race-based approach, the jury was instructed that respondents' theory was that Ford had committed fraud by providing a forecast that was unreasonable in light of the failure rate of black-owned dealerships and by not disclosing data on the results achieved by such dealers. R. 2084-2085. Because respondents had never exhibited the slightest interest in data regarding the performance of minority dealerships, their theory

required a finding that Ford had an affirmative duty to volunteer information on the subject.

The jury returned a verdict in favor of Foster and Sperau, awarding $992,000 in economic damages, $2.5 million for mental anguish to Foster, $1 million for mental anguish to Sperau, and $6 million in punitive damages. The jury found in favor of Ford Credit on its counterclaim against the Speraus and Foster, awarding $635,000. App., *infra*, 34a.

Ford then moved for judgment n.o.v., new trial, or remittitur. On June 29, 1994, following the post-trial hearing, the trial court issued an order resolving Ford's motions. Although indicating that it "may well have determined otherwise than did the jury concerning both the fraud claim and the suppression claim on which this case went to the jury" (C. 4102-4103), the court denied the motions for judgment n.o.v. and new trial. It also declined to disturb the punitive damages. The court did, however, condition the denial of the new trial motion on Foster's acceptance of a remittitur of his award for mental anguish to $500,000 and Sperau's acceptance of a remittitur of his award for mental anguish to $200,000.

After respondents accepted the remittiturs, the Alabama Supreme Court affirmed the judgment in all respects. It held that, given Ford's strong desire to recruit promising minority dealers and its superior knowledge of the historical performance of new minority dealers, there was substantial evidence to support the jury's finding that Ford committed a misrepresentation by stating, notwithstanding this knowledge, that the racially neutral sales and profit forecast was "reasonable." App., *infra*, 44a-46a. It similarly held that there was sufficient evidence to support the jury's finding that Ford committed the tort of suppression in failing to volunteer the race-based information to respondents (even though they never requested any such data). *Id.* at 46a-47a. As for punitive damages, the court simply adopted the trial court's discussion as its own. *Id.* at 52a-57a.

In a dissent joined by Justice Maddox, Justice Houston stated:

> I am concerned about the effect on the vision of this nation of the tort theories advanced by the plaintiffs in

> this case — (1) the fact that a person is a member of a racial minority impairs that person's ability to compete, and (2) that businesses that offer minorities the opportunity to compete without disclosing that alleged racial handicap can be liable for compensatory and punitive damages if a member of that minority enters a business and fails.
>
> I am concerned because I do not believe that a person's race impairs his ability to compete, and if we base tort liability on this false premise, we "attempt the Future's portal with the Past's blood rusted key."

Id. at 61a (quoting J. LOWELL, THE PRESENT CRISIS).

Justice Houston further opined that the punitive damages were excessive. Acknowledging that the Alabama Supreme Court had struck down Alabama's $250,000 cap on punitive damages, which applied in cases that did not involve a pattern or practice of misconduct, Justice Houston nonetheless regarded the $250,000 figure as the best indication of what constitutes the maximum reasonable punishment in non-pattern cases like this one. *Id.* at 62a-66a.

After the Alabama Supreme Court denied rehearing, Ford filed a certiorari petition raising two issues: (1) whether, in view of Alabama's statute limiting punitive damages to those fraud cases in which the defendant intended to deprive the plaintiff of property or otherwise injure the plaintiff, Ford lacked constitutionally adequate notice that its benignly motivated conduct was subject to punishment and (2) whether the $6 million punitive award was unconstitutionally excessive. This Court granted the petition, vacated the Alabama Supreme Court's judgment, and remanded the case for further consideration in light of *BMW*. 116 S. Ct. 1843 (1996).

On remand, the Alabama Supreme Court rejected Ford's argument that it lacked fair notice that its conduct could subject it to punitive damages. Ignoring the Alabama statute and citing only cases applying pre-statute common law, the court reasoned that Ford had notice that it could be punished if found liable for fraud because "[i]t has been the rule in Alabama that upon a finding of

an intent to deceive or defraud, punitive damages may be awarded." App., *infra*, 6a.

Turning to the amount of punitive damages, the court belatedly acknowledged that Ford could not be punished under the fundamentally racist theory on which the jury was instructed. *Id.* at 8a-10a. Rather than throwing out the punitive damages entirely or awarding a new trial, however, the court recognized a wholly new theory — that the forecast to respondents was misleadingly optimistic given the performance history of the prior owner and their status as new dealers.

The court indicated that "Ford's conduct manifests only a moderate degree of reprehensibility" (*id.* at 13a), observing (*id.* at 14a):

> [T]he record does not show that Ford persisted in fraudulent conduct despite prior punishment, and its actions threatened neither health nor safety. The evidence shows that Ford did not intend to wrongly or maliciously appropriate the plaintiffs' property or intend that they lose their investment. Indeed, despite Ford's knowledge that its wholly owned subsidiary would probably not be able to recover much of the loan amounts if the dealership failed, Ford made it possible for the plaintiffs to borrow the amounts that form the basis of the awards of actual damages.

Despite these indicia of non-reprehensibility, the court found "the reprehensibility of Ford's conduct [to] justif[y] a substantial [$1,792,000] penalty" (*id.* at 8a) because, in its view, Ford had knowingly exposed respondents to "the substantial possibility of financial catastrophe" (*id.* at 13a).

Justices Maddox, Houston, and See dissented. Justice Houston reiterated the concerns expressed in his dissent from the original decision. *Id.* at 23a-24a. Justice See, joined by Justice Maddox, dissented because of the "striking absence of reprehensibility." *Id.* at 24a. He explained:

> Instead of selling the Ford dealership to an experienced white Lincoln-Mercury dealer in Selma who had offered to buy it, Ford chose to include Foster in its

> family of dealers so that Ford could achieve social goals that it viewed as more important than a quick profit. Instead of requiring Foster and Sperau to invest $632,000 of capital for the dealership, Ford reduced the required capital investment to $535,000. Instead of accepting the recommendation of Ford Motor Credit Company ("FMCC") to deny Foster and Sperau extensions of credit, Ford instructed FMCC to make the loans to them. ***Only by forensic gymnastics can these facts be construed as "reprehensible."***
>
> Foster and Sperau were mature, experienced businessmen who engaged in arm's-length negotiations with Ford for the purchase of an automobile dealership under Ford's Minority Dealer Program. The dealership failed. Ford's hopes for profits, like those of Foster and Sperau, went unrealized.

Id. at 28a-30a (emphasis added; citations omitted).

Justice See also took the majority to task for "develop[ing] a post hoc 'race-neutral' rationalization to support the $1,792,000 award." *Id.* at 29a n.11. And joining issue on the merits of that rationalization, he pointed out that Ford's Sales and Profit Forecast was reasonable in light of the profits of the prior owner and the amount of capital invested by respondents. He concluded that "the past profit record of the dealership under its prior owner — 7 consecutive years of profits, ending with profits of $193,000 and $180,000 in 1986 and 1987, respectively — and its first (partial) year of profits under Foster and Sperau — $103,000 — support Ford's contention that Foster and Sperau's losses were caused not by Ford's optimistic profit forecasts, or by Foster's race, but by Sperau's, and to some degree Foster's, mismanagement." *Ibid.*

Ford moved for rehearing contending, *inter alia,* that the Alabama Supreme Court's use of a post hoc theory to support the punitive damages violated Ford's right to due process. Ford also argued that the court's resolution of the notice issue was infirm because the court relied on pre-statute law and overlooked the fact that the statute purported to narrow the grounds for imposition of punitive damages in fraud cases. The Alabama Supreme Court denied the motion for rehearing by a vote of 5-2.

REASONS FOR GRANTING THE PETITION

This is yet another example of the lengths to which the Alabama Supreme Court is prepared to go to salvage as much as possible of a multimillion dollar punitive award that it has been ordered by this Court to reconsider in light of *BMW*.[11] *BMW* made clear that no amount of punitive damages is permitted if the defendant lacked fair notice that its conduct was subject to punishment, and that a seven-digit exaction cannot be justified if the degree of reprehensibility of the conduct is low. On remand the Alabama Supreme Court gutted the former limitation on punishment by refusing to acknowledge the Alabama statute that restricts punitive damages to those fraud cases in which the defendant intended to deprive the plaintiff of property or otherwise injure the plaintiff. And it attempted to evade the latter limitation by jettisoning the theory of liability that respondents had urged on the jury (which even the Alabama Supreme Court realized could not support a punitive award) and replacing it with a wholly post hoc rationalization. But even the Alabama Supreme Court's after-the-fact theory does not supply the kind of reprehensibility that would support a $1.8 million punishment under *BMW*. As Justice See put it, "[o]nly by forensic gymnastics can these facts be construed as 'reprehensible.'" App., *infra*, 29a.

This Court has not hesitated to issue a summary reversal or grant plenary review when it has concluded that a lower court has

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[11] This Court vacated and remanded four Alabama cases for further consideration in light of *BMW*. In two of the cases, the Alabama Supreme Court defiantly refused to apply the third *BMW* guidepost (the legislatively established fines for comparable conduct) at all. See *Union Security Life Ins. Co. v. Crocker*, 1997 WL 465647, at *5 (Ala. Aug. 15, 1997), petition for cert. filed Feb. 17, 1998 (No. 97-1331) (approving punitive judgment of between $750,000 and $1 million); *Life Ins. Co. of Georgia v. Johnson*, 701 So. 2d 524, 531 (Ala. 1997) (approving $3 million punitive award). And in a third case, the court ignored that guidepost entirely. See *American Pioneer Life Ins. Co. v. Williamson*, 1997 WL 545880 (Ala. Sept. 5, 1997) (approving $750,000 punitive award). Moreover, in both *Crocker* and *Williamson* the court gave no more than lip service to the first *BMW* guidepost — the degree of reprehensibility of the conduct. See *Union Security Life Ins. Co. v. Crocker*, No. 97-1331, Pet. 18 n.16, 19-22 (filed Feb. 17, 1998).

not faithfully applied a controlling decision in a case that had been remanded for further consideration in light of that decision. See, *e.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652, 1654-1656 (1996); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 91-94 (1993); *Powell v. Texas*, 492 U.S. 680 (1989); *Immigration & Naturalization Serv. v. Pangilian*, 486 U.S. 875, 881-882 (1988); *United States v. Dunn*, 480 U.S. 294, 299-300 (1987). As we now demonstrate, the present case warrants similar treatment.

A. The Alabama Supreme Court Deprived Ford Of Due Process By Justifying Fraud Liability On The Basis Of A Theory That Was Not Presented To The Jury.

This Court repeatedly has held that due process prohibits sustaining a judgment on the basis of a theory other than one on which the case was tried. *See, e.g., Chiarella v. United States*, 445 U.S. 222, 235-237 (1980); *Dunn v. United States*, 442 U.S. 100, 106 (1979); *Presnell v. Georgia*, 439 U.S. 14, 16-17 (1978) (per curiam); *Spevack v. Klein*, 385 U.S. 511, 516-519 (1967) (plurality op.); *Cole v. Arkansas*, 333 U.S. 196, 201-202 (1948). The reason is simple: a defendant must have notice of the claims against it in order to be able to defend against them. To change the nature of the claim after the trial has ended and the party has lost its opportunity to respond to the claim "offends the most basic notions of due process." *Dunn*, 442 U.S. at 106. See, *e.g.*, *Spevack*, 385 U.S. at 518-519 (rejecting appellate court's after-the-fact rationale for sustaining petitioner's disbarment because "that procedure would deny him all opportunity at the trial" to respond to that alternative ground).

In its evident enthusiasm to sustain liability and a seven-digit punitive exaction in this case, the Alabama Supreme Court blatantly violated this principle. As that court was obliged to recognize, respondents' theory of the case was predicated squarely on Foster's skin color. App., *infra*, 2a-4a. See also *id.* at 26a, 28a (See, J., dissenting). Respondents' race-based theory was set forth in their opening statement, in which they asserted that Ford lied with respect to the capitalization requirement and the projected return on capital because "Ford knew that the[re] were unique problems with black dealerships" and that such dealerships "lost money early on." R. 223. This theory also was the centerpiece of the testimony of

their expert witness, Dr. Charles Carter (*see* R. 1255-1284, 1307-1309, 1317-1320, 1364-1365, 1372), who forthrightly stated that he considered a 65.4% projected return to be unreasonably high "[r]elative to the history [of] performance of blacks in the business as reported on the Equal Opportunity Progress Report" (R. 1365). *See also* R. 1257-1258 (same).[12] Indeed, Dr. Carter admitted that, in preparing the data upon which his opinions were based, ***he did not consider "any of the characteristics of the dealership other than the fact they were black."*** R. 1372 (emphasis added). And, most significantly, this theory — and only this theory — was embodied in the theory-of-the-case instruction that ***respondents*** tendered and that the trial court faithfully gave to the jury (R. 2084-2085):

> The plaintiffs claim that Don Kitchens, Dale Wendell and Bill Stang represented to the plaintiffs that the sales and profit forecast and capitalization requirements provided to the plaintiffs were reasonable and that the plaintiffs could rely on the numbers contained therein to make their decision to acquire the Selma Ford dealership.
>
> The Plaintiffs say that these representations were made with the intent to deceive them based upon Ford Motor Company's knowledge of the substantial likelihood of failure of Ford black Minority dealerships within the first two years.
>
> The Plaintiffs contend that under the facts of this case Ford Motor Company was under a duty to disclose

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[12] In concluding that liability could be predicated on a race-neutral theory, the Alabama Supreme Court cited Dr. Carter's statement (R. 1313) that Ford had used "fairly heroic growth rates" for projected new vehicle sales. App., *infra*, 11a. However, Dr. Carter did not purport to be making a generally applicable statement. In response to repeated objections by Ford that Dr. Carter was engaged in a monologue that exceeded the scope of the original question (R. 1314, 1316), respondents' counsel emphasized that Dr. Carter's lengthy statement (which included the reference to "heroic growth rates") was in response to "the original questions * * * that we started with," namely "why was the comparison of what the black dealer body was doing as to the dealer body as a whole important and material in his analysis of these documents." R. 1317.

> all material facts concerning the actual profitability, performance of Ford's black minority dealers and the failure rates of such dealers reflected on Ford Motor Company's own historical data collected with regard to Ford's black minority dealerships.

Although the Alabama Supreme Court found no fault with this theory when it sustained the judgment in its first decision, on remand it took an about-face and, quite properly, renounced this racist approach (App., *infra*, 8a-10a). Under this Court's due process precedents that should have been the end of the matter. But unwilling to send respondents home empty-handed, the Alabama Supreme Court adopted a "post hoc 'race-neutral' rationalization" for a seven-digit punishment (*id.* at 29a n.11 (See, J., dissenting)) — namely that Ford's sales and profit projections for the dealership were unrealistic in view of respondents' relative lack of experience and the performance history of the prior dealer. *Id.* at 10a-12a.[13]

In so doing, the court denied Ford its "most basic" right to notice of the theory against which it must defend. That deviation from established concepts of fairness was critical. If respondents had not so squarely focused this case on their illegitimate race-based theory, but had instead advanced the race-neutral contention that the projections given to them were unduly optimistic in light of their status as new dealers and the performance history of the prior dealer, Ford would have had a very different target to shoot at. That different target would have prompted differences in trial strategy, different witnesses, and different documentary evidence. For example, the Alabama Supreme Court's supposition that new dealers need a few years of experience before they become profitable (*id.* at 11a) is a generalization. As the court recognized in rejecting respondents' race-based theory, generalizations fail to take into account the specific characteristics of the dealership and the prospective operators. *Id.* at 9a. Had Ford known that it was ***this*** generalization that it had to refute, rather than the race-based one advanced at the trial, it could have focused its defense on

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[13] As discussed below, this post hoc rationalization is wholly at odds with the evidence. See pages 25-26, *infra*.

demonstrating that the aggregated data for new dealerships understate the performance of individuals who — like respondents — acquire assets of a successful, on-going dealership, the staff of which has agreed to stay on with the new owners.

It is questionable indeed whether, presented with such evidence, any rational jury would have concluded that Ford deliberately overstated the prospects for the dealership in order to "lure" respondents into acquiring it. Certainly, it would be fundamentally unfair to ***assume*** that a jury would have reached such a conclusion and imposed such enormous punitive damages for the relatively minor delict of giving sophisticated businessmen an allegedly unduly optimistic forecast (accompanied by a clear disclaimer (see page 8, *supra*)).

As in *Presnell*, summary reversal is warranted to correct the Alabama Supreme Court's departure from "fundamental principles of procedural fairness" (439 U.S. at 16).

B. The Alabama Courts Deprived Ford Of Due Process By Permitting Imposition Of Punitive Damages Without Fair Notice To Ford That Its Conduct Was Subject To Punishment.

This Court stated in *BMW* that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment * * *." 116 S. Ct. at 1598. Although obligated to apply this principle on remand, the Alabama Supreme Court effectively eviscerated it.

At the time Ford allegedly deceived respondents into purchasing the then highly successful Selma dealership from the widow of the former dealer,[14] Alabama law affirmatively indicated that Ford's conduct was ***not*** the sort that could give rise to liability for punitive damages. Specifically, although Alabama used to permit punitive damages in any fraud case (other than those

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[14] It is undisputed that the Selma dealership was healthy and profitable at the time that Foster and Sperau took it over. R. 1603, 1730. It also is undisputed that the dealership generated a healthy profit in the year after the two men acquired it. App., *infra*, 42a; R. 585, 982-983.

involving so-called "innocent" misrepresentations), effective June 1987 — *i.e.*, before the events in this case — the legislature narrowed the standard to allow punitive damages only in those cases in which the fraud was "committed with the intention * * * of * * * depriving [the plaintiff] of property or legal rights or otherwise causing injury." ALA. CODE § 6-11-20.

The Alabama Supreme Court acknowledged that Ford did not intend to deprive respondents of property or otherwise injure them. App., *infra*, 12a-13a ("[t]his is not a situation where a defendant fraudulently induced the plaintiffs to invest for the malicious purpose of wrongfully appropriating for itself the plaintiffs' property"); *id.* at 14a ("[t]he evidence shows that Ford did not intend to wrongly or maliciously appropriate the plaintiffs' property or intend that they lose their investment"); *id.* at 15a ("Ford lacked a malicious intent to wrongfully deprive the plaintiffs of any of their investment").[15] It nevertheless concluded that Ford had fair notice that its conduct was subject to punishment because "[i]t has been the rule in Alabama that upon a finding of an intent to deceive or defraud, punitive damages may be awarded." *Id.* at 6a.[16] In

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[15] That conclusion was compelled by the record. Because Ford was not the seller of the dealership and did not earn a franchise fee or commission for assisting the seller in locating a buyer, there was no contention, let alone evidence, that Ford was motivated by an intention to deprive Foster and Sperau of property or otherwise harm them. To the contrary, unlike most frauds, in which the plaintiff's loss is the defendant's gain, Ford's undeniable interest was for Foster and Sperau to succeed. The more successful that Foster and Sperau could be in operating a Ford dealership, the more cars and parts the dealership would purchase from Ford and the better off Ford would be. Conversely, failure of the dealership would translate directly into harm to Ford, which had expended substantial sums to help launch River City Ford (see App., *infra*, 35a n.4) and which would lose market share and suffer other adverse consequences — including a less successful minority dealership program — if respondents did not make a go of it and if, as a result, Ford did not have a successful dealership in that location (see *id.* at 13a; R. 1477-1478, 1544, 1808).

[16] The Alabama Supreme Court cited six cases in support of this proposition. Four — *American Honda Motor Co. v. Boyd*, 475 So. 2d 835 (Ala. 1985); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Griffin*, 493 So. 2d 1379 (Ala. (continued...)

essence, the court — without notice — retroactively expanded the scope of punishable conduct to return Alabama to the pre-statute common law standard.

The case is, in this regard, remarkably like *Bouie v. City of Columbia*, 378 U.S. 347 (1964), one of the cases cited in *BMW* for the requirement that defendants have fair notice of the conduct that will be deemed punishable. See 116 S. Ct. at 1598 n.22. There, a statute prohibited the entry onto another's property after the posting of notice prohibiting such entry. The petitioners, two African-American students, were convicted under that statute after refusing to move from a "whites only" lunch counter. The state supreme court upheld the convictions by interpreting the statute to encompass the act of remaining on the premises of another after being asked to leave. This Court reversed, concluding that application of the unambiguously narrow statute to the conduct of the petitioners violated their due process rights. It explained:

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required to speculate as to the meaning of penal statutes

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[16] (...continued)
1986); *Ex parte Lewis*, 416 So. 2d 410 (Ala. 1982); *Shiloh Constr. Co. v. Mercury Constr. Corp.*, 392 So. 2d 809 (Ala. 1980) — were decided before the statute was enacted. Because the conduct involved in the remaining two — *German Auto, Inc. v. Tamburello*, 565 So. 2d 238 (Ala. 1990); *Carnival Cruise Lines, Inc. v. Goodin*, 535 So. 2d 98 (Ala. 1988) — occurred before the statute's effective date, the statute was not applied in those cases either. Moreover, those cases were decided after the conduct in the present case and so could not have provided Ford with notice of anything even if they had applied the statute.

> * * * or to guess at the statute's meaning and differ as to its application * * *, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.
>
> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.

378 U.S. at 352 (internal quotation marks, citations, and brackets omitted).

Here, as in *Bouie*, the relevant part of Alabama's punitive damages statute was (and is) "narrow and precise." Ford therefore "had no reason even to suspect" that its conduct, which was not even arguably motivated by an intent to deprive respondents of property or otherwise harm them, would "be retroactively brought within [the scope of the punitive damages statute] by an act of judicial construction." Accordingly, as in *Bouie*, the imposition of punishment in this case violates due process.

Because the Alabama Supreme Court's judgment upholding the imposition of punitive damages cannot be squared with *Bouie* and *BMW*, the Court should summarily reverse the judgment or, in the alternative, grant plenary review.

C. The $1.8 Million Punishment Is Grossly Excessive And Therefore Violates The Due Process Clause Of The Fourteenth Amendment.

The Court remanded this case for a determination of whether a $6 million punitive award is excessive under *BMW*. As in other cases that were remanded to it,[17] the Alabama Supreme Court's

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[17] In *Crocker, supra*, the Alabama Supreme Court sustained a punishment in the range of $750,000 to $1 million even though the defendant insurer was held liable on a purely vicarious basis for an isolated incident of *ultra vires*

(continued...)

response was to engage in "forensic gymnastics" (App., *infra*, 29a (See, J., dissenting) in order to allow as large a punishment as possible. Review is warranted because the Alabama Supreme Court's decision reflects an effort to circumvent *BMW*, not fairly apply it.

1. Relying on a "post hoc * * * rationalization" (*id.* at 29a n.11 (See, J., dissenting)), the Alabama Supreme Court found the conduct in this case to be sufficiently reprehensible to warrant a $1.8 million punishment. As discussed above, the court's use of a theory upon which the jury was not instructed constitutes an independent due process violation. But putting that aside, the theory selected by the Alabama Supreme Court is so utterly lacking in evidentiary support as to compel the conclusion that the court failed in its duty to apply *BMW*.

The $1.8 million tort hypothesized by the Alabama Supreme Court was the provision of a Sales and Profit Forecast that (allegedly) was misleading given the performance of the prior dealer and Ford's data indicating that new dealers as a group tend to be less successful than established dealers. In constructing this theory, however, the court ignored the undisputed fact that, unlike many new dealers, respondents were taking over an existing, successful dealership and were inheriting its experienced staff. There is no evidence in the record that "new" dealers in such circumstances do materially worse than "established" dealers.

With regard to the dealership's performance history, the Alabama Supreme Court ignored the fact that the Sales and Profit Forecast itself contained detailed data on the prior dealership's sales and profits from the previous year. C. 4897. To the extent that Ford was projecting a significant improvement over those figures, that was clear from the face of the Forecast. The court also ignored the undisputed evidence that, after receiving the revised

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[17] (...continued)
conduct on the part of an employee of the co-defendant bank, who was as an agent of the defendant solely for the limited purpose of selling insurance. In *Williamson, supra,* the court set a $750,000 punishment without even explaining why the defendant's conduct amounted to a tort (as opposed to a simple breach of contract).

Forecast and discussing the changes with Kitchens (R. 304-306, 451-453, 962-963) and Ronald Bortnick, an experienced and successful Ford dealer (R. 306), Sperau returned to the dealership several times, conferred with the general manager, discussed the dealership's methodology for determining the inventory of parts needed, investigated the dealership's historical sales data for new and used vehicles and parts, and checked the forecast for new car sales against the Polk Registrations, a listing of registered vehicles by market area and manufacturer that gives an indication of growth potential. R. 1042-1044, 1059-1060, 1087-1088. Given the free access that respondents had to the dealership, its employees, and its financial data, there is no basis for inferring that they lacked adequate information to determine whether the Forecast was reasonable in view of the historical performance of the dealership.

Thus, the record does not support the Alabama Supreme Court's after-the-fact theory. But even if it did, that is only the beginning of the *BMW* analysis. It does not establish that the conduct is "sufficiently egregious to justify a [seven-digit] punitive sanction that is tantamount to a severe criminal penalty." *BMW*, 116 S. Ct. at 1604.

Indeed, none of the indicia of reprehensible conduct identified in *BMW* are present in this case. As the Alabama Supreme Court itself recognized, Ford's intention in recruiting respondents for the dealership and then insisting that FMCC finance the acquisition was benevolent. App., *infra*, 12a-13a, 14a, 15a. Moreover, there was no evidence that Ford had ever been held liable for providing a misleading forecast in the past. *Id.* at 8a, 14a. The tort did not involve a vulnerable, unsophisticated victim. To the contrary, the transaction was an arm's-length one involving two experienced businessmen who had the opportunity to visit the dealership, review its data, interview its staff, and question the Ford employees about the assumptions used in the forecast. *Id.* at 8a; *id.* at 29a (See, J., dissenting); R. 304-306, 451-453, 962-963, 1038-1039, 1042-1045, 1059-1060, 1087-1088, 1842-1844.

The only basis given by the Alabama Supreme Court for its conclusion that the conduct justified a $1.8 million punishment was its belief that "Ford knowingly exposed [respondents] to the substantial possibility of financial catastrophe." App., *infra*, 13a.

As in *Crocker*, however, there simply is no evidence to support this after-the-fact justification for a seven-digit punishment. The record reflects that Ford required respondents to invest $222,000 more in the dealership than the prior owner (and thus to provide it with a substantial cushion in the event of an economic downturn), that respondents were inheriting the entire staff of the prior owner, including the highly experienced general manager, and that the dealership had been profitable for seven consecutive years. *Id.* at 11a n.3; R. 1602-1609, 1848. Given these facts, it is only by engaging in "forensic gymnastics" (App., *infra*, 29a (See, J., dissenting) that the Alabama Supreme Court could conclude that Ford knowingly exposed respondents to a substantial risk of financial catastrophe.

2. The fact that the Alabama Supreme Court set the punitive damages at an amount that is not a large multiple of the compensatory damages or in excess of the treble damage limit set by the State's Deceptive Trade Practices Act (*id.* at 22a-23a) in no way justifies the choice of a seven-digit punishment.[18] The

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[18] We note that here, as in *Crocker* and *Johnson*, the Alabama Supreme Court expressly refused to compare the punishment to the DTPA's $2,000 administrative fine — the very one used by this Court in *BMW* — because that fine, in its view, is too "meager." App., *infra*, 18a. Putting aside the impropriety of ignoring the administrative fine, the treble damages remedy on which the court did rely could not have supplied Ford with constitutionally adequate notice that it could be subjected to a $1.8 million punishment. To begin with, as the Alabama Supreme Court recognized (*id.* at 17a), the widow's sale of the dealership to respondents may have been analogous to, but was not in reality, a seller-assisted marketing plan. Accordingly, the fact that misrepresentations in connection with seller-assisted marketing plans could result in treble damages gave Ford no notice that it could be subjected to a jury-imposed punishment of $1.8 million for providing an allegedly misleading profit and sales forecast to the purchasers of an automobile dealership. Nor did notice come from the catch-all prohibition against "unconscionable, false, misleading, or deceptive" acts referred to by the Alabama Supreme Court (see *id.* at 17a n.6). Violations of that provision are subject to the treble damages remedy only if they cause monetary damage to a "consumer" (ALA. CODE § 8-19-10(a)), which is defined in the statute as "[a]ny natural person who buys goods or services for personal, family or household use" (*id.* § 8-19-3(2)). Plainly, respondents

(continued...)

overarching command of *BMW* is to determine whether the punitive award in question is "grossly excessive" in relation to the State's interests in retribution and deterrence. 116 S. Ct. at 1595. Whether the ratio of punitive to compensatory damages is 1:1, 10:1, or 100:1, a $1.8 million punitive exaction cannot be sustained unless the record supports the conclusion that a punishment of this magnitude is needed to assure that deterrence and/or retributive goals are adequately served.

The Alabama Supreme Court did not — and, we submit, could not — explain why piling a $1.8 million punishment on top of already exorbitant compensatory damages of $1.7 million[19] was necessary to accomplish either of these goals in this case. To the contrary, although setting punitive damages at a modest multiple of compensatory damages may be well designed to accomplish deterrence and retribution in the case of a profit-motivated tort — *i.e.*, one in which the plaintiff's loss is the defendant's gain — (see *BMW*, 116 S. Ct. at 1607-1608 (Breyer, J., concurring), even a 1:1 ratio will be excessive — will overpunish and overdeter — when the tort is not economically motivated and the compensatory damages therefore substantially exceed the profit from the wrongdoing. That manifestly is the case here. As the Alabama

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[18] (...continued)
were not consumers under the statute and hence the treble damages remedy would not have been available against Ford. Finally, the treble damages remedy is not automatic. The statute provides that this remedy may be utilized at the discretion of the trial court, which must consider "the amount of actual damages awarded, the frequency of the unlawful acts or practices, the number of persons adversely affected thereby and the extent to which the unlawful acts or practices were committed intentionally * * *." *Id.* § 8-19-10(a)(2). Here, the Alabama Supreme Court has found that the conduct was an isolated incident and that Ford's motivations were benevolent. In view of these findings, the mere theoretical possibility of a treble damages remedy provided Ford no actual notice that it could suffer a $1.8 million punitive exaction.

[19] Although there was substantial unrefuted evidence that respondents drained the dealership's capital for personal expenses, the jury awarded them the full amount that they invested in the dealership. In addition, their judgment, as remitted, includes a remarkable $700,000 for mental anguish.

Supreme Court recognized, Ford made no profit as a result of its alleged "fraud"; to the contrary, it lost money and suffered a range of other adverse consequences as a result of the failure of the dealership. App., *infra*, 13a, 19a-21a.[20] Thus, from Ford's perspective — which is the only relevant one for purposes of punitive damages — the entire compensatory award of $1.7 million plus interest was a dead-weight loss and, to the extent any deterrence was needed,[21] fully served that function. See *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory") (emphasis omitted); *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). A $1.8 million penalty on top of the $1.7 million compensatory award is thus "grossly excessive" in relation to the deterrent and retributive objectives, despite its proportionality to the compensatory damages and the DTPA treble damages remedy.[22]

* * * * *

In sum, through "forensic gymnastics" and retroactive alteration of the theory of the case, the Alabama Supreme Court

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[20] The court specifically noted that Ford could have allowed an established white dealer to purchase the assets of the dealership and that, by instead offering the opportunity to respondents, it "probably surrendered some immediate profits from sales of Ford products that likely would have resulted from having a more experienced dealer than the plaintiffs operating in Selma." App., *infra*, 20a.

[21] We remind the Court that the Alabama Supreme Court repeatedly recognized that there was no evidence that Ford had ever provided a misleading forecast to any other prospective dealer. App., *infra*, 8a, 14a. Because there was no evidence of "recidivism," the need for deterrence is greatly diminished.

[22] It warrants noting in this regard that, far from deterring undesirable conduct, the $1.8 million punishment in this case is more likely to have the deleterious effect of deterring companies like Ford from engaging in voluntary affirmative action programs. See App., *infra*, 23a-24a (Houston, J., dissenting).

has sought to evade, not apply, *BMW*. That effort at evasion warrants either summary reversal or plenary review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1998

APPENDIX A

FORD MOTOR COMPANY

v.

DEE-WITT SPERAU AND SAMUEL R. FOSTER II.

1931591.

Supreme Court of Alabama.

Sept. 5, 1997.

Appeal from Lowndes Circuit Court (CV-91-34)

On Remand from the Supreme Court of the United States

PER CURIAM.

This case is on remand from the Supreme Court of the United States. The question before us is whether the $6 million punitive damages award assessed against Ford Motor Company is excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, in light of the guidelines established by the Supreme Court of the United States in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 116 S.Ct. 1589.

The facts of this case are set forth in detail in our original opinion, *Sperau* v. *Ford Motor Co.*, 674 So.2d 24 (Ala.1995). We note them here briefly: In the period 1987-1988, employees of the defendant Ford Motor Company ("Ford") sought to convince the plaintiff Samuel R. Foster II, who is African-American, to purchase a Ford automobile dealership in Selma, Alabama. Ford viewed Foster as an attractive candidate for Ford's Minority Dealer Program, a voluntary affirmative action policy established to increase the number of minority Ford dealers. At that time, Foster owned and operated a commercial construction business in Charlotte, North Carolina, but had no experience in the automobile industry. Because of his inexperience, Foster took on the plaintiff Dee-Witt C. Sperau, who is white, as a partner in seeking to acquire a Ford dealership. Sperau was then an employee of Foster's company; he assisted in obtaining construction bonds for that company. Sperau had had some bookkeeping experience at

three Ford dealerships between 1968 and 1971, but had not been involved in the automotive industry since then.

In connection with the prospective purchase of the Selma dealership, Ford representatives presented to Foster and Sperau a "sales and profit forecast" that had been prepared on the dealership. This initial sales and profit forecast indicated that Foster and Sperau would have to make a capital investment of $632,000 to run the dealership, and it projected profits of $292,000 and $358,000 in the first two years of operation, which translated to returns on investment of 46.2% and 56.6%, respectively. After visiting the dealership, Foster and Sperau decided not to invest. Ford's Atlanta District market representation manager, Don Kitchens, then prepared a second sales and profit forecast on the Selma dealership and presented it to Foster. The revised forecast, which was made with the plaintiffs specifically in mind, reduced the required investment to $535,000 and listed as reasonable expected profits of $274,000 and $350,000, returns on investment of 51.2% and 65.4%.

Relying upon the revised forecast, Foster and Sperau ultimately decided to purchase the dealership, which they operated under the name "River City Ford." Unfortunately, the forecast profits failed to materialize. The plaintiffs began operating the River City Ford dealership in May 1988. For the remainder of 1988, the dealership did record a profit of approximately $103,000. But in 1989 and 1990, the dealership posted net losses of roughly $4,000 and $6,000, respectively. Finally, River City Ford filed a bankruptcy petition, and the dealership closed in January 1991.

Soon after that collapse, Foster and Sperau filed this action against Ford; Ford Motor Credit Company ("Ford Credit"), which is Ford's wholly owned subsidiary financing corporation; and a Ford Credit employee. Foster and Sperau claimed, among other things, that, in an effort to induce them to purchase the Selma dealership, Ford had committed intentional misrepresentations and fraudulent suppression. The plaintiffs alleged that through the monitoring of its Minority Dealer Program, in which Foster's dealership was a participant, Ford was aware that its minority dealers did not perform as well as the average Ford dealer and that its minority dealers experienced smaller average returns on

investment and were more likely to lose money each year. Reports to Ford's board of directors show that for the years 1984 through 1987, the four years preceding the sale of the Selma dealership to the plaintiffs, the Ford dealer body experienced yearly returns on investment of 53%, 44%, 42%, and 45%, compared with returns for minority dealers over the same period of 25%, 20%, 16%, and 27%. Similarly, for 1985 through 1987, the percentage of Ford dealerships reporting a yearly net loss was 16%, 16%, and 9%, while for black dealers the percentages for the same years were 34%, 39%, and 23%. Ford was also aware that prospects were even worse for newly appointed dealers, both black and white. Fifty-eight percent of minority Ford dealers who had been in business for one year or less were in a loss position for the year-to-date as of July 1986, while 22% of white dealers with similar experience posted losses for that year-to-date period. Conversely, only 15% of white Ford dealers in business for more than one year were in a loss position for that same year-to-date period, although 26% of minority owners, even among this experienced group, posted losses.

Ford's reports also recognized that minority dealers often possessed certain characteristics that Ford believed accounted for the lower achievement, such as "considerably less retail management experience, ... a typically high initial turnover of people, ... higher fixed costs, and ... difficulty in attracting qualified management personnel." The reports repeatedly noted that many minority dealerships were in the early stages of development and were still encountering start-up costs in the "difficult launch period" and that all the more profitable dealers had been in business over two years and were the most experienced. Finally, the 1987 report, the last report prepared before the plaintiffs purchased the dealership, also displays that Ford was aware that more "black loss dealers" could be expected in the immediate future, predicting: "Because of the marginal profitability of newly appointed dealers, and our aggressive black dealer appointment target, we will continue to have a high number of black loss dealers until they have gained more retail experience."

Foster and Sperau contended that because the Selma dealership would be a minority-owned dealership, Ford's estimates of potential profits and of the amount of capital required were intentionally

misleading, given the information in Ford's possession. The plaintiffs' fraudulent suppression claim stemmed from Ford's failure to disclose to them the information on the past performance of minority dealers. At trial, Ford denied that it had a duty to reveal the information concerning the average performance of black-owned dealerships and denied that that information was material to the plaintiffs' decision to purchase the dealership. Ford further claimed that its forecast projections were reasonable and that River City Ford's failure was proximately caused by severe mismanagement on the part of the plaintiffs. Ford Credit counterclaimed against Foster and Sperau, as guarantors, for debts owed to it by the dealership.

The jury's verdict awarded Foster and Sperau $992,000 in damages for economic losses relating to debts they had incurred to purchase and operate River City Ford, and awarded $635,000 to Ford Credit on its counterclaim against the plaintiffs for loans Ford Credit had made to the dealership. The jury found that Foster and Sperau were entitled to damages in the amounts of $2.5 and $1 million, respectively, as compensation for mental anguish. And finally, the jury assessed punitive damages of $6 million against Ford for its fraudulent conduct. After Ford had filed numerous post-trial motions, the trial court conducted a hearing pursuant to *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala.1986), *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala.1989), and § 6-11-23(b), Ala.Code 1975. The trial court determined that Foster and Sperau's respective awards for mental anguish should be reduced to $500,000 and $200,000, but concluded that the $6 million punitive damages award was justified. On appeal, this Court affirmed the judgment of the trial court in its entirety, specifically holding that the $6 million punitive damages award was not excessive. Ford petitioned to the Supreme Court of the United States for certiorari review. In a memorandum, *Ford Motor Co.* v. *Sperau*, ___ U.S. ___, 116 S.Ct. 1843 (1996), the Supreme Court granted certiorari review, vacated our judgment, and remanded the case for further consideration in light of its decision in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996). On remand, we again affirm the judgment of the trial court, conditioned upon the plaintiffs' filing in this Court a

remittitur reducing the punitive damages award to the sum of $1,792,000.

In its 5-4 decision reversing the judgment of this Court in *BMW*, supra, the Supreme Court of the United States concluded, for the first time, that the amount of a punitive damages award rendered it violative of the Due Process Clause of the Fourteenth Amendment, notwithstanding that the punitive award was the product of procedures that had previously passed constitutional muster. *BMW*, 517 U.S. at ___, 116 S.Ct. at 1598; see *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). The Supreme Court stated that, under the Due Process Clause, a defendant has the right to "fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose" for such conduct. *BMW*, 517 U.S. at ___, 116 S.Ct. at 1598. The Court recognized that "[p]unitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition." *Id.*, 517 U.S. at ___, 116 S.Ct. at 1595 (citations omitted). "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests," the Court continued, "does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* (citation omitted). In order to help reviewing courts better identify punitive damages awards that cross the line into constitutional impropriety, the Supreme Court identified the following three "guideposts": (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to the amount of actual or potential harm suffered by the plaintiff, and (3) a comparison of the amount of the punitive damages award with civil or criminal penalties authorized or imposed in comparable cases. *Id.*, 517 U.S. at ___ - ___, 116 S.Ct. at 1598-99.

In this Court's opinion on remand, *BMW of North America, Inc.* v. *Gore* (*"BMW II"*), [Ms. 1920324, May 9, 1997] ___ So.2d ___ (Ala.1997), this Court pointed out that the United States Supreme Court majority did not dismiss the review process already established by this Court in *Hammond* and *Green Oil*, supra, and upheld as constitutional in *Haslip*, supra. *BMW II*, ___ So.2d at ___. Indeed, we recognized that the first two "guideposts" set out by the United States Supreme Court, the degree of reprehensibility of the defendant's conduct and the ratio of the punitive award to

actual or potential harm suffered by the plaintiff, are already encompassed within the *Hammond-Green Oil* review. *Id.* Thus, rather than supplanting our established review procedures,

> "[we saw] the three guideposts as factors to be emphasized in a judicial review of a punitive damages award pursuant to *Hammond, Green Oil*, and Ala.Code 1975, § 6-11-23(b). In sum, the United States Supreme Court's *BMW* decision seems to hold that the presumption of validity Alabama extends to a jury verdict must yield to a more meaningful judicial review of that verdict when it is challenged by a tortfeasor as excessive."

Id. at ___.

Accordingly, in this case, we comply with the Supreme Court's mandate to reconsider the excessiveness question, by employing the factors enumerated in *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala.1989), as we view them now in light of the Supreme Court's decision in *BMW*. However, before reexamining the question of excessiveness of the award, we note that Ford also contends that the imposition upon it of *any* punitive damages violates the Due Process Clause of the Fourteenth Amendment. We conclude that this argument is without merit.

The evidence in this case would have permitted the jury to find, by a clear and convincing standard, that Ford "consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff[s]," § 6-11-20(a), Ala.Code 1975, by intending to deceive and mislead them by overestimating the true profit potential of the dealership and underestimating the amount of capital required to run it, in order to increase Ford's minority dealer count. It has been the rule in Alabama that upon a finding of an intent to deceive or defraud, punitive damages may be awarded. *German Auto, Inc.* v. *Tamburello*, 565 So.2d 238, 240 (Ala.1990). See also *Carnival Cruise Lines, Inc.* v. *Goodin*, 535 So.2d 98 (Ala.1988); *American Honda Motor Co.* v. *Boyd*, 475 So.2d 835 (Ala.1985); *Ex parte Lewis*, 416 So.2d 410 (Ala.1982) (Jones, J., concurring specially).[1] For, as this Court has stated,

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[1] The defendant's intent to deceive or mislead, or "scienter," has been

"Once an intent to deceive has been established, it is difficult to understand that the fraud was not committed grossly." *Alabama Farm Bureau Mut. Cas. Ins. Co.* v. *Griffin*, 493 So.2d 1379, 1384 (Ala.1986), citing *Shiloh Constr. Co.* v. *Mercury Constr. Corp.*, 392 So.2d 809 (Ala.1980). We now proceed to the substantive factors enumerated in *Green Oil*, supra.

A. Degree of Reprehensibility

In discussing the first guidepost, the United States Supreme Court stated:

> "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.' ... This principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that 'nonviolent crimes are less serious than crimes marked by violence or the threat of violence.' ... Similarly, 'trickery and deceit' ... are more reprehensible than negligence."

BMW, 517 U.S. at ___, 116 S.Ct. at 1599 (citations omitted). The reprehensibility of the defendant's conduct is one of the factors

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the standard prerequisite for imposing punitive damages in fraud cases. See, e.g., *Cartwright* v. *Hughes*, 226 Ala. 464, 147 So. 399 (1933); *Munroe* v. *Pritchett*, 16 Ala. 785 (1849).

In addition, § 6-5-104(a), Ala.Code 1975, which defines the tort of fraudulent deceit, provides as follows: "One who willfully deceives another with intent to induce him to alter his position to his injury *or risk* is liable for any damage which he thereby suffers." (Emphasis added.) "'Deceit'... results from either a willful or a reckless misrepresentation or a suppression of material facts with an intent to mislead." *Hughes* v. *Hertz Corp.*, 670 So.2d 882, 888 (Ala.1995), citing *Whitlow* v. *Bruno's, Inc.*, 567 So.2d 1235 (Ala.1990). Deceit is an intentional tort that, when proved to the satisfaction of the finder of fact, will support an award of punitive damages. *American Honda Motor Co.* v. *Boyd*, supra.

Alabama courts consider in the common-law excessiveness review required by *Green Oil*:

> "'The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.'"

539 So.2d at 223. As we noted in *BMW II*, while this factor has been part of the *Hammond-Green Oil* review, it perhaps has not heretofore been given the weight in the analysis that the Supreme Court suggested in *BMW* that it should receive. ___ So.2d at ___.

Applying this guidepost to Ford's conduct in this case, we hold that, while the reprehensibility of Ford's conduct justifies a substantial penalty, Ford's conduct does not exhibit the extremely high degree of reprehensibility that would indicate a $6 million punitive damages award. We first note that the record does not reveal that Ford had been punished for similar misconduct prior to this case. As in *BMW*, the injury inflicted upon the plaintiffs was purely economic in nature, with the conduct indicating no "disregard for the health and safety of others." See 517 U.S. at ___, 116 S.Ct. at 1599. Given that Foster and Sperau were both college-educated, possessed substantial business experience, and had the financial capacity to purchase an automobile dealership, it is difficult to conceive that they were especially "financially vulnerable," as that term is commonly understood. See *id.*; compare *Life Ins. Co. of Georgia* v. *Johnson*, [Ms. 1940357, August 15, 1997] ___ So.2d ___ (Ala.1997). However, given Ford's knowledge of the plaintiffs' limited personal wealth in relation to the large amounts they had to borrow to invest, Ford was aware not only that the plaintiffs ran a substantial risk of losing their investment, but also that they might face complete financial ruin if the dealership failed.

We reject the suggestion that Ford's failure to employ or disclose all information in its possession that was purely "race based" was especially reprehensible, or even necessarily unlawful

at all. Clearly, much of the information in Ford's possession regarding the past performance of its minority dealerships was not material to the plaintiffs' particular circumstances and did not necessarily bear upon the potential of the specific Selma dealership. Neither Foster nor Sperau ever asked for, or ever showed any interest in, the history of black dealerships generally, despite their substantial investigation into whether they should purchase the dealership. We find their lack of interest in this area unsurprising, for dealers are, of course, individuals, each one bringing to the table a certain amount of capital to invest, relevant experience, diligence, intelligence, contacts within the industry, etc. Similarly, dealerships also exist within a concrete context of a location with a certain market size and economic conditions, sales and profit history, costs, etc. These factors, and undoubtedly others, have an impact, to varying degrees, on the potential and actual performance of a given Ford dealership, and the evidence showed that the plaintiffs' inquiries focused upon these kinds of considerations, to allow them to determine whether they, as individual investors, could run this particular dealership in Selma, Alabama, to produce income at a level to their satisfaction.

Because the sole defining trait of minority dealerships is the race of the dealer, the data on their history ignore the wide range of aspects of both the individual dealers and the specific dealerships they operate that are encompassed within the population and the business environment. But if one accepts that Foster's race alone entitles him to be told the known history of all minority dealers or requires the preparation of a "race-specific" forecast, then one is also recognizing that a primary determining factor of a potential dealer's ability to compete and succeed in operating a particular dealership is race. We do not acknowledge such a proposition, nor have we ever held that all information on black dealers was "material" within the context of this case.

If one hypothesizes that Ford attempted to rationalize a discriminatory policy against qualified minority members seeking to purchase dealerships by pointing to the data showing that, on average, black dealers were much less successful than white dealers, one can imagine the swift and harsh response. The admonition would likely be, in effect, "Such statistics, even if true, are not material because Ford is not permitted to evaluate potential

dealers based upon racial generalizations or stereotypes. Rather, it must judge each by using criteria regarding the potential dealer's individual abilities and qualifications that are reasonably thought to bear upon the capacity to successfully operate a particular retail automobile establishment — and race is, emphatically, not one of those qualities deemed material to that capacity." But if, on the other hand, Ford demonstrated that it denied approval to a minority dealer on the specific "race-neutral" grounds that the applicant lacked sufficient capital and experience in the automobile industry, such reasons, if not merely pretextual, would be legitimate. See *Brown* v. *American Honda Motor Co.*, 939 F.2d 946 (11th Cir.1991), cert. denied, 502 U.S. 1058 (1992).

So too in this case. If the fact that an applicant is African-American would not be material to the applicant's ability to operate the dealership in the hypothetical discriminatory context stated above, that same fact cannot be material to that issue here either. The information on the history of minority dealers cannot be material because of what it might show about the outlook for a prospective dealer *because* he is of a racial minority, but rather only for what it might reveal about characteristics *other than race* that are thought to have a bearing on the plaintiffs' chances for successful operation of the dealership.[2] When Ford prepared the revised forecast that purported to be a reasonable prediction for the plaintiffs' operation of the Selma dealership, the minority dealership data alerted Ford to the fact that the plaintiffs shared with the

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[2] This may be illustrated by the fact that it becomes more difficult to conceive of the minority-dealer data as material as one imagines plaintiffs who do not share traits of the minority-dealer body generally. If one were to assume, for example, that Foster and Sperau were experienced Ford dealers who could transfer in an experienced staff and had large surpluses of capital, it becomes questionable whether any of the minority-dealer data would be at all indicative of their chances to successfully operate a dealership. In fact, under such circumstances, providing a "race-specific" forecast of lower profits or disclosing discouraging information on minority dealers could itself be misleading as to the true potential of the dealership. In addition, Ford clearly may not offer disparate contractual terms, such as capitalization requirements, on the basis of race alone. See *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

minority-dealer body some of the most significant traits, most notably a sharp lack of experience in automobile sales, that Ford itself had identified as impeding performance. In addition, the minority dealer reports revealed that newly appointed dealers, such as these plaintiffs, regularly experienced "marginal profitability" because of start-up problems and higher fixed costs. These factors, as Ford was aware, weighed very heavily against its forecast of immediate and substantial improvement over the performance of an experienced, established dealer in the same market.

The evidence of the specific history of the Selma dealership known to Ford also would allow the jury to reasonably infer that Ford knew its forecast was misleading. In the prior owner's seven years of operation, the Selma dealership had never generated more than a $193,000 profit (or 55% return on the prior owner's smaller capital investment) in any year and had averaged only about $96,000 annually.[3] Referring to this performance, Bill Stang, Ford's Atlanta District sales manager, stated that "from the profitability standpoint [the Selma dealership] was a very, very excellent dealership under the prior owner." Yet, Ford represented to the plaintiffs that it was reasonable to expect profits of $274,000 and $350,000, and returns of 51.2% and 65.4%, for the plaintiffs' first two years of operation in the same market. In addition, the plaintiffs' expert economist, Dr. Charles Carter, stated that the forecast figures were unreasonable and, as an example, pointed out Ford's use of what he called "fairly heroic growth rates" for projected new vehicle sales. Carter noted that in 1987, the prior owner's last year of operation, which Stang conceded was a "good year" for Ford, the dealership had sold 381 new vehicles and had cleared $732 per vehicle. Ford's forecast, however, projected that Foster and Sperau could be expected immediately to increase the number of new vehicles sold to 465 and 557 in the first two years, while simultaneously increasing the profit on each to $926. Carter indicated that, in his opinion, the chances of such immediate and

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[3] There was evidence to suggest that the profits for the Selma dealership for the seven years under the prior owner, who had made an initial $348,000 capital investment, were as follows: 1981—$44,200; 1982—82,000; 1983—$74,000; 1984—$46,000; 1985—$58,000; 1986— $193,000; 1987—$180,000.

significant increases over the performance of the established dealer both in the number of units sold and in the profit per unit, in the same market, were extremely remote.

Further, there was evidence suggesting that even Ford Credit representatives did not find that Ford's sales and profit forecast or capital requirement for Selma was reasonable and that it recognized that the plaintiffs would be in an exceedingly precarious financial situation in operating the dealership. After the plaintiffs had raised approximately half of the required capital investment, they sought financing for the rest in a loan from Ford Credit. Gary Birdsong, a Ford Credit employee in Dothan, performed an initial credit analysis on the plaintiffs' file and recommended that the loan application be rejected, concluding, "The debt structure will be high and ability to meet monthly expenses is based primarily on the Sales and Profit Forecast as prepared by Ford Motor Company. Risk to Ford Credit appears to be poor." Birdsong also noted that Foster and Sperau's "tangible-based capital," basically a measure of net worth, and "working capital," the money with which the business has to operate, both appeared to be "inadequate"; and he later stated that the percentages were "extremely low" in relation to recommended guide amounts. Birdsong's superiors at Ford Credit's main office in Dearborn, Michigan, similarly concluded that the loan should be rejected. David Cottingham, the Ford Credit staff operations manager, recommended rejection, primarily based upon Foster and Sperau's lack of experience in the automotive industry, their limited net worth, and what would be a heavy debt. Cottingham's superior, John Chadwick, similarly agreed that the loan request should be rejected because, he said, River City was not "really a minority dealer, [the] operators lack ... experience and ... ability to get operating capital if they have start up problems [and they] have borrowed to their capacity now."

Based on the foregoing evidence, the jury could have reasonably inferred that Ford knew that its forecast for the particular Selma dealership was unreasonable and that it made the representations with the intent to mislead and deceive the plaintiffs, for the purpose of inducing the plaintiffs to purchase the dealership when they would not have done so otherwise. Clearly, this case is unusual, though, in that many of the interests of Ford and the interests of the plaintiffs were closely aligned. This is not a

situation where a defendant fraudulently induced the plaintiffs to invest for the malicious purpose of wrongfully appropriating for itself the plaintiffs' property. The evidence gives every indication that Ford intended and hoped that the Selma dealership would flourish under the plaintiffs' direction and would stand as a shining example of the success of its Minority Dealer Program. As the jury found, Ford Credit, Ford's wholly owned subsidiary, was owed $635,000 on loans it had made to the dealership; these loans were made, as the plaintiffs themselves emphasize, only because of urging by the parent Ford corporation, despite unanimous initial recommendations by Ford Credit employees to reject the application because of the likelihood that the funds could never be repaid. Thus, it was only because of Ford's commitment, despite its knowledge that the plaintiffs had limited assets with which to secure the loans, that the plaintiffs were able to borrow in the first place most of the funds that are the basis for the actual damages award. It is undisputed that, far from deriving a benefit from the failure of the plaintiffs' dealership, Ford would absorb losses associated with locating a replacement dealer and that its own image, and that of its Minority Dealer Program specifically, would suffer as well as the result of such a failure.[4] Based upon the evidence, we conclude that the only "injury" Ford could be said to have actually intended is that the plaintiffs would acquire a dealership that Ford knew possessed a smaller profit potential than forecast and placed the plaintiffs at greater financial risk than represented.

We conclude that Ford's conduct manifests only a moderate degree of reprehensibility. The fraud in this case will support a significant punitive damages award only because, by purposefully and intentionally deceiving the plaintiffs about the true prospects of the dealership, Ford knowingly exposed them to the substantial possibility of financial catastrophe. While only some of the data on the minority dealers were actually material to the plaintiffs'

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[4] The plaintiffs themselves point out that while Ford and Ford Credit are technically separate corporate entities, Ford Credit's profits are ultimately consolidated as income to Ford Motor Company. Thus, Ford would also indirectly lose if Ford Credit was unable to recover amounts owed to it by the dealership, a likely possibility if the dealership failed.

operation of the Selma dealership, the reports on the minority dealer program did indicate "race-neutral" considerations material to the plaintiffs' circumstances that Ford recognized would very likely hinder their chances of achieving the forecast performance. Further, there was also evidence presented that contrasted the forecast with the past profitability of the Selma dealership itself; this evidence strongly indicated the forecast was unreasonable. However, the record does not show that Ford persisted in fraudulent conduct despite prior punishment, and its actions threatened neither health nor safety. The evidence shows that Ford did not intend to wrongly or maliciously appropriate the plaintiffs' property or intend that they lose their investment. Indeed, despite Ford's knowledge that its wholly owned subsidiary would probably not be able to recover much of the loan amounts if the dealership failed, Ford made it possible for the plaintiffs to borrow the amounts that form the basis of the awards of actual damages.

B. Ratio of Punitive Damages to Actual or Likely Harm

As to the second guidepost, the Supreme Court noted that the "perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff" and it noted the "principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages." ___ U.S. at ___, 116 S.Ct. at 1601. The Court stated:

> "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. ... Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. ... In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis."

___ U.S. at ___ - ___, 116 S.Ct. at 1602-03. (Citations omitted; emphasis original).

The ratio of the $6 million punitive damages award to the $992,000 of actual monetary damage is approximately 6:1. When the plaintiffs' awards for mental anguish, as remitted by the trial court, are included, the total of $1,692,000 gives a punitive:compensatory ratio of about 3.5:1. This ratio is obviously far smaller than the 500:1 ratio in *BMW*, see 517 U.S. at ___ - ___, 116 S.Ct. at 1602-03, and is even below the approximately 4:1 ratio that the United States Supreme Court found might be "close to the line" in *Haslip*, supra. 499 U.S. at 23. Thus, it is somewhat difficult to say that in this case the ratio alone "must surely 'raise a suspicious judicial eyebrow.'" *BMW* at 1603, quoting *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 482 (1993) (O'Connor, J., dissenting). This factor does not, in itself, seem to indicate that a substantial remittitur is required. However, given that Ford lacked a malicious intent to wrongfully deprive the plaintiffs of any of their investment, given that Ford made it possible for the plaintiffs to initially borrow most of funds they eventually lost, and given the substantial amount of compensatory damages, we conclude that the conduct in this case indicates that the ratio should not be much greater than 1:1.

C. Sanctions for Comparable Misconduct

The third guidepost stated by the United States Supreme Court in *BMW* is "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at ___, 116 S.Ct. at 1603. State courts making this comparison should "'accord substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *BMW*, 517 U.S. at ___, 116 S.Ct. at 1603, quoting *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part).

The plaintiffs contend that the Alabama Securities Act, § 8-6-1 et seq., Ala.Code 1975, provides the legislative sanction for misconduct most similar to Ford's in this case. That Act prohibits fraudulent conduct by "any person, in connection with the offer, sale, or purchase of any security," § 8-6-17, Ala.Code 1975. The Securities Act designates that a conviction for a knowing violation of the Act is punishable as a Class C felony and also provides for

civil liability for damages, costs, and attorney fees. See §§ 8-6-18(a), 8-6-19, Ala.Code 1975. The plaintiffs emphasize that Ford's Don Kitchens, the employee who prepared the revised forecast, testified that a sales and profit forecast is "used more or less as a prospectus for that dealership point."

We recognize that the Alabama Securities Act does protect investor interests somewhat similar to those at issue in this case. Thus, it perhaps could be said that the Securities Act is relevant to demonstrate that the legislature has decided that a serious criminal penalty may be warranted in cases of fraud involving investments generally. However, the assets of the Selma dealership purchased by the plaintiffs are not a "security," as that term is broadly defined by § 8-6-2(10), Ala.Code 1975.[5] This Court has also specifically held that an "investment contract" was not a "security" where a promoter exercised only remote control over a franchisee who conducted his business independently, and, therefore, that in

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[5] Section 8-6-2(10) defines "security," for the purposes of the Alabama Securities Act, as follows:

> "SECURITY. Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit- sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, annuity contract unless issued by an insurance company, bankers' shares, trustees' shares, investment participating bonds, investment trust debentures, units, shares, bonds and certificates in, for, respecting, or based upon any form of securities or collateral, subscriptions and contracts covering or pertaining to the sale or purchase on the installment plan of any security as herein defined, or subscription or contracts covering or pertaining to the sale or purchase of beneficial interest in title to property, profits or earnings, or any right to subscribe to any of the foregoing, or any instrument of any kind commonly known as a security."

such a situation the Securities Act did not apply. *Burke* v. *State*, 385 So.2d 648 (Ala.1980). Given that the subject of the transaction in this case, i.e., the assets of the Selma dealership, so clearly falls outside the subject matter regulated by the Securities Act, we conclude that the Securities Act, and the penalties provided for in that Act, might provide Ford with only limited notice of the severity of the punitive award in this case.

Ford, on the other hand, argues that we should look to the Deceptive Trade Practices Act ("DTPA"), § 8-19-1 et seq., Ala.Code 1975, as providing due process notice of the severity of the possible punishment. Ford claims that its conduct, as found by the jury, could be compared with the conduct prohibited by § 8-19-5(20), which declares unlawful the following:

> "In connection with any seller-assisted marketing plan, either misrepresenting the amount or extent of earnings to result therefrom, or misrepresenting the extent or nature of the market for the goods or services, or both, sold or delivered in connection with the plan.... As used herein, 'seller-assisted marketing plan' includes any plan, scheme, or system in which for a consideration a buyer acquires goods or services, or both, together with a plan, scheme, or system for the resale of said goods or services, or both."

Ford contends that the Selma dealership is not technically a "seller-assisted marketing plan," but that this section is analogous in that Ford sells vehicles to the dealer and provides the dealer with assistance in reselling the vehicles at retail to the public.[6] Ford emphasizes that a knowing violation of the DTPA carries only a civil fine, of not more than $2,000. § 8-19-11(b), Ala.Code 1975.

Assuming that Ford is correct in arguing that the DTPA provides the best example of a legislative sanction for comparable misconduct, it must be recognized that the Act also grants a statutory private right of action that permits a recovery of up to

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[6] The DTPA also prohibits "[e]ngaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce." Section 8-19-5(23), Ala.Code 1975.

three times any actual damage, in the court's discretion, plus costs and a reasonable attorney fee. Section 8-19-10(a)(2) and (3), Ala.Code 1975. Ford contends that the proper focus for due process purposes should be upon what the maximum civil fine could be under § 8-19-11(b), rather than on what the maximum recovery might have been had a plaintiff pursued a private action under § 8-19-10. Ford correctly points out that when the United States Supreme Court conducted its analysis under this guidepost in *BMW*, the Court mentioned only the possible maximum $2,000 civil fine under § 8-19-11(b), not the approximately $12,000 the plaintiff might have recovered in a private action under the DTPA, given the $4,000 in actual damage he had suffered in that case. See *BMW*, 517 U.S. at ___, 116 S.Ct. at 1603. However, we discern no reason why the $2,000 civil fine, rather than the potential liability delineated under § 8-19-10, is a more reliable expression of the legislature's judgment as to what is the appropriate punishment for conduct comparable to Ford's. Indeed, given that the legislature specifically granted the private right of action with the possible recovery of treble damages and, as well, preserved the availability of common law and statutory remedies for fraud,[7] it could easily be argued that the legislature implicitly recognized that a maximum $2,000 civil fine per violation is affirmatively *not* an appropriate penalty for all such violations because the varying degrees of plaintiffs' injuries and defendants' culpability dictate a greater degree of flexibility in punishment. We also do not see why the civil fine would provide materially superior notice to a defendant who might be equally subject to the liability that has been legislatively established uner the private right of action. –

As we recognized in *BMW II*, a $2,000 statutory penalty for deceitful conduct is so meager that there is little basis for comparing it with any meaningful punitive damages award. ___

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[7] We note that the "savings clause" of the DTPA provides that the remedies under that Act do not displace remedies for fraud, misrepresentation, deceit, or suppression that are available under the common law, statute, or otherwise. However, the remedies under the Act and those otherwise available are mutually exclusive. Section 8-19-15, Ala.Code 1975.

So.2d at ___. However, we conclude that the statutory maximum liability that would potentially exist under the DTPA's private right of action in this case does provide an amount that can be meaningfully compared to the punitive damages award. The plaintiffs' actual economic damage in this case, as found by the jury, amounted to $992,000. So the maximum *total recovery* permitted for a violation of the DTPA under the private right of action of § 8-19-10, treble damages plus costs and reasonable attorney fees, would be somewhat over $3 million. A punitive award of $1,792,000, added to the $992,000 award for economic loss and the $700,000 award for mental anguish, results in a total recovery of $3,484,000.

D. Removing the Defendant's Profit

In a *Hammond-Green Oil* review, we are required to determine whether, if the wrongful conduct was profitable to the defendant, the punitive damages removed that profit and were in excess of the profit, so that the defendant recognizes a loss. *Green Oil*, 539 So.2d at 223. The plaintiffs argue that Ford derived from its fraud an amount of money exceeding $15 million, which was the total amount of Ford products sold and interest paid by the River City dealership. The plaintiffs also emphasize that Ford obtained substantial benefits through its recruitment of minority dealers, such as the plaintiffs. They cite, for example, that the 1987 report to Ford's board of directors recognized that the minority dealers had sales that year totaling approximately $1 billion. Finally, the plaintiffs allege that the Minority Dealer Program provided Ford the added benefits of positive corporate image and allowed Ford to keep dealerships in less desirable geographical locations in business.

We conclude that Ford did derive at least some temporary benefits as a result of its fraudulent misrepresentation and suppression in this case but that determining a specific dollar amount of profit is difficult. We find the $15 million figure cited by the plaintiffs to be highly exaggerated, for it simply represents the *gross* sales of River City Ford, not the profits to Ford itself. The profits flowing to Ford from those retail sales would have been only some unknown fraction of the gross sales. But even if that direct profit was discernible, more problematic for the plaintiffs'

position is the fact that there is no evidence to suggest that no one else would have run the Selma dealership had the plaintiffs decided not to invest. It is true that the evidence indicates that Ford was having trouble attracting a minority dealer to Selma. But as the plaintiffs themselves emphasize, Ford, in insisting that the Selma dealership be operated by a minority dealer, had blocked at the last moment a proposed sale to a local white Lincoln-Mercury dealer who had sought to expand his business. Thus, there is every indication that Ford, absent its fraud, might have had to settle for a white dealer in Selma, but nothing suggests anything approaching a $15 million direct profit to Ford. As Ford points out, if there is any reasonable inference to be drawn from the evidence it is that Ford probably surrendered some immediate profits from sales of Ford products that likely would have resulted from having a more experienced dealer than the plaintiffs operating in Selma.

In addition, the issue we address here is the profit Ford derived from its specific fraudulent conduct in this case, not the benefits Ford may have obtained from its lawful, indeed laudable, voluntary affirmative action program as a whole. We agree that the evidence would reasonably allow the finding that the Minority Dealer Program sooner or later improves Ford's overall profits by providing Ford a positive corporate image, by increasing sales to minorities, and by keeping open some of its dealerships that otherwise might close. But adding a single minority Ford dealer in Selma, Alabama, translates only into some small incremental benefit to the program as a whole. Concentrating on benefits to Ford from the entire Minority Dealer Program may help one to understand Ford's motivation for attempting to attract minority investment, but such a focus can be misleading to one attempting to assess Ford's profit in this case.

It does appear, however, that Ford valued the Selma dealership as especially attractive for its potential to advance the image of both Ford generally and the Minority Dealer Program specifically. Given Selma's national association with the civil rights movement, Ford believed that the operation of a successful minority dealership there would demonstrate both the viability of minority dealerships in the program and Ford's resolve in giving opportunities to minorities. Thus, a minority dealer in Selma might have increased Ford sales to minorities locally and perhaps would have encouraged

other minorities to similarly invest in a Ford dealership, although, as noted above, the record does not suggest that the consistently profitable Selma dealership was in any danger of closing absent the plaintiffs' investment. However, in terms of "removing" the defendant's wrongfully obtained profit in this case, it is difficult to see that Ford has still retained any significant profit it might have anticipated. An attempted minority dealership in Selma might allow Ford to be viewed as having extended an opportunity to a minority dealer, but the dealership's visible failure would likely only discourage future minority investment.

E. The Financial Position of the Defendant

This Court has acknowledged that a defendant's financial position is relevant to determining the propriety of an amount of punitive damages. *Green Oil*, 539 So.2d at 223. "[F]or punitive damages to be effective the amount of damages 'ought to be large enough to hurt. It ought to sting in order to deter[; this] is its purpose.'" *Associates Financial Services Co. of Alabama, Inc.* v. *Barbour*, 592 So.2d 191, 199 (Ala.1991), quoting *Ridout's-Brown Service, Inc.* v. *Holloway*, 397 So.2d 125, 127 (Ala.1981) (Jones, J., concurring specially). However, as the United States Supreme Court has stated, "plaintiffs [should] not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Haslip*, supra, 499 U.S. at 22. Thus, in *BMW II* this Court recognized that "where a defendant has not committed an act that would warrant a large punitive damages award, such an award should not be upheld upon judicial review merely because the defendant has the ability to pay it." ___ So.2d at ___. Also in *BMW II*, we suggested that a punitive damages award that exceeds 10% of the defendant's net worth could indicate that the award should be reduced, particularly where the defendant's conduct is not highly reprehensible. ___ So.2d at ___.

It is obvious that a punitive damages award of even $6 million does not begin to approach 10% of the net worth of Ford Motor Company. The trial court noted that Ford's net income for 1993 alone was approximately $2.5 billion. Accordingly, a punitive damages award of even $6 million would not have a devastating impact upon Ford's financial position. However, as we have

previously noted, Ford's conduct in this case exhibited only a moderate degree of reprehensibility.

F. The Costs of Litigation

Green Oil mandates that a court consider the plaintiff's costs of litigation when reviewing a punitive damages award for excessiveness. 539 So.2d at 223. This policy encourages bringing wrongdoers to trial. *Independent Life & Accident Ins. Co.* v. *Harrington*, 658 So.2d 892, 905 (Ala.1994), cert. pet. dismissed, ___ U.S. ___, 116 S.Ct. 1587, (1996). As this Court acknowledged in its original opinion, the costs associated with this trial, in time and money, were substantial. 674 So.2d at 40. However, "all of the costs of litigation would be more than adequately covered" by even a $1,792,000 punitive award in this case. *Principal Financial Group* v. *Thomas*, 585 So.2d 816, 818 (Ala.), cert. denied, 502 U.S. 1009 (1991).

G. Criminal Sanctions

Green Oil requires that a court reviewing a punitive damages award for excessiveness consider whether the defendant has suffered any criminal sanctions for the wrongful conduct. Any such sanctions might be taken into account to suggest a reduction of the punitive damages award that otherwise would be appropriate. 539 So.2d at 223-24. No criminal sanctions have been imposed upon Ford for its conduct in this case, so this factor does not suggest a reduction of punitive damages.

H. Other Civil Actions

Finally, *Green Oil* states that if there have been other civil actions against the same defendant, based on the same conduct, this also should be taken into account to suggest a reduction of the punitive damages award that otherwise would be appropriate. 539 So.2d at 224. The record does not reveal that there have been other civil actions against Ford for the same conduct.

Conclusion

We initially determined that Ford's right to due process was not violated by the imposition of a $6 million punitive damages award. However, after reconsidering the amount of the award, in light of the Supreme Court's decision in *BMW*, we decide that the

punitive damages award should be reduced from $6 million to $1,792,000, an amount slightly greater than the amount of compensatory damages assessed by the jury, as reduced by the trial court. Further, a punitive award of $1,792,000 results in a total recovery of $3,484,000, which is fairly indicated by the maximum recovery specifically authorized for the statutory private right of action under the Deceptive Trade Practices Act. Finally, given our conclusion that Ford has not retained significant profit from its fraudulent conduct in this particular case, the reduced punitive award is appropriate. As with the original award, a $1,792,000 punitive award more than covers the plaintiffs' costs of litigation.

The trial court's judgment is affirmed on the condition that the plaintiffs file with this Court within 21 days a remittitur of punitive damages to the sum of $1,792,000; otherwise, the judgment will be reversed and this cause remanded for a new trial.

AFFIRMED CONDITIONALLY.

Hooper C.J., and Shores, Kennedy, and Cook, JJ., concur.

Almon, J., concurs in the result.

Maddox, Houston, and See, JJ., dissent.

Butts, J., recuses himself.

HOUSTON, JUSTICE (dissenting).

I dissent, for reasons I expressed when this Court released its opinion in *Sperau* v. *Ford Motor Co.*, 674 So.2d 24 (Ala.1995):

> "I am concerned about the effect the tort theories advanced by these plaintiffs may have on the vision of this nation. Those theories are (1) that a person's being a member of a racial minority impairs that person's ability to compete, and (2) that businesses that offer members of minorities the opportunity to compete, without disclosing that alleged racial handicap, can be liable for compensatory and punitive damages if one of the members accepts that opportunity and then fails.
>
> "I am concerned because I do not believe that a person's race impairs his or her ability to compete, and because I believe that to base tort liability on the false

premise that it does is to 'attempt the Future's portal with the Past's blood rusted key.'

"Mel Farr, chairman of the Ford Lincoln-Mercury Black Dealers Association, testified in this case, expressing the opinion that qualified minority applicants should have 'an opportunity to participate in the ... free enterprise system that says you have the right to fail and you have the right to succeed.' Farr further testified that, in his opinion, it is insulting to suggest that race has anything to do with that success or failure in a business venture.

"There are tens of thousands of franchised new car dealerships in this country that generate billions of dollars in annual sales. The automobile industry, through its franchises, is a major source of small business opportunities in this country. I am concerned that the jury verdict in this case could have a significant negative impact on this country's efforts to make 'equal opportunity' a reality of the American economy.

"*James Russell Lowell, *The Present Crisis.*"

674 So.2d at 42.

SEE, JUSTICE (dissenting).

Because of the striking absence of reprehensibility in this case, I respectfully dissent from the award of $1,792,000 in punitive damages.

I would determine the appropriate amount of punitive damages in this case by applying a strict state law reasonableness standard based on the factors established in *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala.1989), as reinvigorated in Justice Houston's special concurrence in *BMW of North America, Inc.* v. *Gore*, [Ms. 1920324, May 9, 1997] ___ So.2d ___ (Ala.1997) ("*BMW II*")(Houston, J., concurring specially).[8] Because the trial judge

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[8] I adopted this reasoning in *Life Insurance Co. of Georgia v. Johnson,*

placed sufficient facts and analysis in the record to permit appellate review of the reasonableness of the punitive damages award, it is not necessary to remand this case.[9]

Since the 1960s, the defendant Ford Motor Company ("Ford") has voluntarily conducted a nationwide "Minority Dealer Program," under which it has tried to promote minority participation in the ownership and operation of one of America's largest and most important industries, the automobile industry. *Sperau* v. *Ford Motor Co.*, 674 So.2d 24, 28 (Ala.1995). In 1988, as part of the Minority Dealer Program, Ford sold an automobile dealership in Selma, Alabama, to Samuel Foster, a black man, and Dee-Witt Sperau, a white man. *Id.* at 30-32. In an effort to achieve its self-imposed goal for minority dealerships, Ford lowered the price of the dealership and lent Foster and Sperau capital, even though they did not meet the ordinary experience and net worth qualifications for purchasing the dealership. *Id.* at 31. Ford gave Foster and Sperau a profit forecast that showed profits could potentially reach $274,000 in the first year and $350,000 in the second year of operation, after an initial investment of $535,000. Ford did not reveal to Foster and Sperau that, in the past, the average Ford minority dealer had earned less in profits and had experienced more losses than the average white dealer. *Id.* at 29. Nor did Ford disclose data showing that new dealers appointed under the Minority Dealer Program usually made only marginal profits. *Id.* Also, Ford did not disclose to Foster and Sperau that on a smaller capital investment of $348,000 the prior owner of the Selma dealership had earned $193,000 in 1986 and $180,000 in 1987.

Foster and Sperau are college-educated, experienced businessmen. They purchased the Selma dealership from Ford and

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[Ms. 1940357, August 15, 1997]___So.2d.___,___ (Ala.1997) (See, J., concurrin in part and dissentin in part.)

[9] In *Hammond* v. *City of Gadsden*, 493 So.2d 1374, 1379 (Ala.1986), this Court required "trial courts to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages."

earned approximately $103,000 in 1988, but lost approximately $4,000 in 1989 and $6,000 in 1990. *Id.* at 32. The dealership filed a bankruptcy petition in 1991. *Id.* Foster and Sperau sued Ford, alleging, among other things, fraud and fraudulent suppression, contending that "because the Selma dealership would be a minority-owned dealership, Ford's estimates of potential profits and of the amount of capital required were intentionally misleading, given the information in Ford's possession." ___ So.2d at ___.

The Lowndes County jury returned a verdict for Foster and Sperau. After the trial court reduced the mental anguish awards for Foster and Sperau, the total award was:

Economic Loss		$992,000	
Mental Anguish:			
Foster	$500,000		
Sperau	200,000		
		700,000	
Less: Loans due Ford [10]		(635,000)	
Net Compensatory Damages			$1,057,000
Punitive Damages			6,000,000
Total Jury Award			$7,057,000

Sperau, 674 So.2d at 27-28.

On appeal, this Court adopted the trial court's order and refused to make any reduction in the $6 million punitive award, in large part because:

> "'There was ... evidence from which the jury could determine, by a clear and convincing standard, that the deception of the Plaintiffs was committed with Ford's knowledge of the financial condition of the Plaintiffs, their degree of experience, *the profitability and loss experience of black dealers participating in the Minority*

[10] These loans were made by Ford Motor Credit Company, a subsidiary of Ford Motor Company.

> *Dealer Program* under circumstances similar to the Plaintiffs, and the economic impact the failure of the dealership would have on the Plaintiffs. ...
>
> "'....
>
> "'Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, *the end of meeting an extremely aggressive black dealer count* does not justify the perpetration of an intentional fraud.'"

Id. at 38-39. The Supreme Court of the United States vacated this Court's judgment and remanded this case for reconsideration in light of *BMW of North America, Inc.* v. *Gore*, ___ U.S. ___, 116 S.Ct. 1589 (1996) ("*BMW*"). *Ford Motor Co.* v. *Sperau*, ___ U.S. ___, 116 S.Ct. 1843 (1996).

Today, this Court approves a punitive award of $1,792,000. Based on the following analysis, I disagree.

1. *Ratio of Punitive Damages to Compensatory Damages* — The jury awarded $6,000,000 in punitive damages, and, after the trial court's offset of loans due to Ford, $1,057,000 in compensatory damages. *Sperau*, 674 So.2d at 27- 28. Because this greatly exceeds the three-to-one benchmark ratio of punitive to compensatory damages, the record must demonstrate clear and specific justification for such a punitive award.

2. *Reprehensibility* — To justify a punitive damages award of more than three times compensatory damages, the reprehensibility of the defendant's actions must include: (1) endangerment of the physical health and safety of others; or (2) economic harm resulting from an intentional misrepresentation, deceit, or concealment of a material fact, as set out in Ala.Code 1975, § 6-11- 20(b)(1), coupled with either (a) conduct repeated in spite of prior punishment, or (b) a substantial number of similar misrepresentations or acts of concealment. *BMW II*, ___ So.2d at ___ (Houston, J., concurring specially). Ford's conduct did not endanger the physical health or safety of anyone, and Foster and Sperau did not demonstrate that Ford had engaged in repeated fraudulent conduct despite prior punishment. The record fails to reflect a substantial number of similar misrepresentations of profit

potential in Alabama. Ford may not have disclosed the minority dealer performance statistics to black dealer candidates elsewhere in the nation, but there is no indication that such nondisclosure was illegal outside Alabama. This conduct cannot, therefore, be considered in the computation of the punitive award. See *BMW*, ___ U.S. at ___, 116 S.Ct. at 1597 ("Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents."). Thus, an award of more than three times compensatory damages is unwarranted. The question before us, then, is what punitive award, not in excess of three times compensatory damages, is reasonable.

The gist of Foster and Sperau's case was that Ford should have told them that they were likely to fail because Foster was black and most of Ford's black dealers do not perform as well as most of Ford's white dealers. See *Sperau*, 674 So.2d at 27 ("The plaintiffs claimed that the representations [regarding forecasts of potential profits] were made in order to induce them to purchase the Ford dealership and with an intent to deceive them, *based upon Ford Motor Company's knowledge that minority dealerships were less successful than the average dealership*.") (emphasis added). In short, Foster and Sperau contend that because most black dealers in Ford's Minority Dealer Program did not perform as well as most of Ford's white dealers, Foster himself was less likely to succeed. Absent a showing, which was not made here, that Foster personally, and his partner Sperau, could not expect to run as profitable a dealership as could an average white dealer, and that Ford knew or should have known this, but suppressed it, I cannot agree with the majority's holding that Ford's minority recruitment effort was reprehensible.

Instead of selling the Ford dealership to an experienced white Lincoln-Mercury dealer in Selma who had offered to buy it, Ford chose to include Foster in its family of dealers so that Ford could achieve social goals that it viewed as more important than a quick profit. Instead of requiring Foster and Sperau to invest $632,000 of capital for the dealership, Ford reduced the required capital investment to $535,000. *Sperau*, 674 So.2d at 31. Instead of accepting the recommendation of Ford Motor Credit Company ("FMCC") to deny Foster and Sperau extensions of credit, Ford

instructed FMCC to make the loans to them. *Id.* at 31-32. Only by forensic gymnastics can these facts be construed as "reprehensible."[11]

Foster and Sperau were mature, experienced businessmen who engaged in arm's-length negotiations with Ford for the purchase of an automobile dealership under Ford's Minority Dealer Program.

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[11] It is difficult to support the rationale of the majority's opinion in *Sperau*, 674 So.2d at 38-39, which found liability in Ford's failure to disclose race-based statistics. If Ford had presented Foster and Sperau the statistics showing that minority dealers turned in an average financial performance that was less than that of its white dealers, Ford could have exposed itself to legal actions for the subsequent sale of the dealership to a nonminority candidate. Cf. *Brown* v. *American Honda Motor Co.*, 939 F.2d 946 (11th Cir.1991), cert. denied, 502 U.S. 1058 (1992). Instead of the Sperau rationale, the plurality today, on reconsideration, develops a post hoc "race-neutral" rationalization to support the $1,792,000 award. Specifically, the plurality now finds a "moderate degree" of reprehensibility in Ford's use of optimistic profit projections because of "race-neutral" factors such as a lack of experience, lack of capital, and the Selma dealership's former return on investment. ___ So.2d at ___. It is difficult to recast these factors as wholly "race-neutral," when the very purpose of a minority recruitment program is to compensate for the disadvantage of just these factors.

Moreover, although Ford's forecasts of potential profits of $274,000 in 1988 and $350,000 in 1989 appear optimistic when they are compared to the prior owner's profits of $193,000 in 1986 and $180,000 in 1987, Ford's profit forecasts assumed, and Foster and Sperau made, a greater capital investment—$535,000—than did the prior owner—$348,000. Given the increased capital investment, Ford's forecast of a return of 51.2% and 65% for 1988 and 1989, respectively, is comparable to the previous owner's 55% return in 1986. Indeed, the past profit record of the dealership under its prior owner—7 consecutive years of profits, ending with profits of $193,000 and $180,000 in 1986 and 1987, respectively—and its first year of profits under Foster and Sperau—$103,000—support Ford's contention that Foster and Sperau's losses were caused not by Ford's optimistic profit forecasts, or by Foster's race, but by Sperau's, and to some degree Foster's, mismanagement. See *Sperau*, 674 So.2d at 32 (stating the Sperau would be in charge of day-to-day operations, while Foster would visit the dealership once a week).

The dealership failed. Ford's hopes for profits, like those of Foster and Sperau, went unrealized.

The facts of this particular case, with its absence of genuinely reprehensible acts, justifies only a *de minimis* punitive award.[12]

3. *Civil and Criminal Sanctions for Similar Conduct*— Section 8-19-11(b), Ala.Code 1975, provides a maximum civil fine of $2,000 for a violation of the Deceptive Trade Practices Act, which punishes "fraudulent" conduct similar to that alleged in this case. The level of this fine supports a *de minimis* punitive award of no more than a few thousand dollars.[13]

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[12] In *Sperau* v. *Ford Motor Co.*, 674 So.2d 24 (Ala. 1995), this Court decided that an award of punitive damages is appropriate in this case. The only issue properly before this Court on this remand is the determination of the amount of punitive damages. *Ford Motor Co.* v. *Sperau*, ___ U.S. ___, 116 S.Ct. 1843 (1996) (remanding for reconsideration in light of *BMW*).

[13] Although the plurality rejects treble damages as a benchmark for the ratio comparison called for by the Supreme Court in *BMW*, ___ U.S. at ___ - ___, 116 S.Ct. at 1601-03, it embraces the treble damages measure of § 8-19-10(a)(2)'s private right of action, as the proper basis for the fixed civil/criminal sanction comparison, also required by the Supreme Court, *id.* at ___ - ___, 116 S.Ct. at 1603-04. In *BMW*, however, the Supreme Court mandated that courts apply both the flexible ratio guidepost *and* the fixed civil/criminal sanction guidepost. The ratio factor provides a flexible measure of the relationship between actual and punitive damages, while the fixed civil/criminal sanction provides a static measure of the Legislature's judgment of the appropriate maximum fixed penalty for a certain type of wrongful conduct. In applying these distinct guideposts, the Supreme Court noted the use of treble damages as a possible ratio, *id.* at ___ - ___ n. 33, 116 S.Ct. at 1601-02 n. 33, and it specifically used the $2,000 civil fine imposed under Ala.Code 1975, § 8-19-11(b), not the private right of action of § 8-19-10(a)(2), for the fixed civil/criminal sanction guidepost, *id.* at ___ n. 39, 116 S.Ct. at 1603 n. 39. It is interesting to note that the plurality appears to embrace a 3:1 ratio only when its final punitive damages award produces a ratio of less than 3:1, not when it produces a ratio that is greater than 3:1. Compare today's plurality opinion, ___ So.2d at ___ (embracing the 3:1 ratio as a comparative factor when the final punitive award produces an approximate

4. *Profitability of Conduct*—As the plurality recognizes, Ford made little, if any, discernible profit on the failed dealership. ___ So.2d ___. Any reputational benefit Ford received from assisting minorities by advancing its Minority Dealer Program in Selma derives from the admirable nature of Ford's actions. Thus, this factor also supports the imposition of only a *de minimis* punitive damages award.

5. *Financial Position of the Defendant*—The plurality notes that Ford's nationwide net income for 1993 was approximately $2.5 billion. ___ So.2d ___. Although the net income generated by Ford's operation of its Minority Dealer Program in Alabama would be a more relevant number in this case, the lack of reprehensibility of Ford's conduct supports only a *de minimis* punitive award and a corresponding *de minimis* impact on its financial condition.

6. *Costs of Litigation*—The plaintiffs' attorneys tried the case to a jury and did a thorough job of handling the direct appeal and the application for rehearing in this Court. *Sperau*, 674 So.2d 24-42. There was no evidence of abuse of the legal process. Given the particular facts of this case, a *de minimis* punitive damages award, combined with the award of $1,057,000 in compensatory damages, including $700,000 for mental anguish, should amply cover the reasonable costs of litigation.

Because of the lack of reprehensibility, and because of Ford's admirable voluntary efforts to include minority dealers in the ownership and operation of its business, I conclude that only a *de minimis* punitive damages award is reasonable in this case.

I dissent.

Maddox, J., concurs.

1.1:1 ratio of punitive to compensatory damages, based on the plurality's computation of gross compensatory damages) with *Life Ins. Co. of Georgia* v. *Johnson*, [Ms. 1940357, August 15, 1997] ___ So.2d ___, ___ (Ala.1997) ("*Johnson* II ") (refusing to embrace the 3:1 ratio as a comparative factor when the final punitive award produced a 12:1 ratio of punitive to cmpensatory damages).

APPENDIX B

DEE-WITT C. SPERAU, ET AL.

v.

FORD MOTOR COMPANY, ET AL.

1931473, 1931591, 1931629.

Supreme Court of Alabama.

June 9, 1995.

PER CURIAM.

This is a fraud case arising out of the purchase of a Ford Motor Company dealership in Selma, Alabama by Samuel R. Foster, II, an African-American minority dealer candidate in Ford Motor Company's Minority Dealer Program, and Dee-Witt C. Sperau, Foster's business partner. This Ford dealership was operated by these plaintiffs under the name of "River City Ford" from May 11, 1988, until the failure of the business in January, 1991.

Foster and Sperau filed a complaint against Ford Motor Company on May 15, 1991, alleging fraud, breach of contract, and violation of the Motor Vehicle Franchise Act, § 8-20-1 et seq., Code of Alabama 1975. Their complaint was first amended to contain a count for civil conspiracy, and again amended to name Sperau's wife, Diane, and Foster's wife, Chandra, as plaintiffs. The second amended complaint made claims for fraud, deceit and fraudulent suppression against Ford Motor Company, Ford Motor Credit Company and Gary L. Birdsong.[1] The basis of the Plaintiffs' claims were that Ford personnel represented to them that the sales and profit forecast and capitalization requirements provided to them were reasonable, and that the plaintiffs could rely on the numbers contained therein to make their decision to acquire the Ford dealership in Selma. The plaintiffs claimed that the representations were made in order to induce them to purchase the Ford dealership and with an intent to deceive them, based upon

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[1] Ford Credit's Branch Manager in Dothan, Alabama.

Ford Motor Company's knowledge that minority dealerships were less successful than the average dealership. It is the plaintiffs' contention that Ford Motor Company was under a duty, because of a confidential relationship and/or special circumstances, to disclose to them all material facts concerning the profitability, performance, and failure rates of minority dealers as reflected in the Equal Opportunity Progress Reports ("EOP Reports") to which only Ford Motor Company had access.

The defendants filed separate answers and motions to dismiss. In addition, Ford Motor Credit Company asserted a counterclaim against the plaintiffs, as guarantors on the debts of River City Ford. The plaintiffs answered, asserting affirmatively the defenses of estoppel, waiver, and unclean hands.

The first trial of the case commenced on March 29, 1993. The trial judge directed a mistrial in the case, based on the inability of the jury to reach a unanimous verdict. The defendants filed notice of appeal with the Supreme Court of Alabama; this Court struck the appeal. The defendants also sought a writ of mandamus on the basis of the trial court's rulings on their post trial motions. The petition for writ of mandamus was denied.

Prior to the second trial of the case, the trial court issued its order concerning various pretrial motions.[2] This order of February 14, 1994, dismissed all claims of plaintiffs Diane Sperau and Chandra Foster and dismissed the fraud claims of Sperau and Foster against Ford Motor Credit Company and Gary Birdsong.

The case then came on to be tried. On February 18, 1994, at the close of the plaintiffs' evidence, the trial court granted a directed verdict on the breach of contract claims of Foster and Sperau to Ford Motor Credit Company. The trial court also directed a verdict on plaintiffs' claims that Ford personnel had made misrepresentations regarding the rate of success and profitability of minority dealers. Finally, the trial court directed a verdict in favor of Ford Motor Credit Company and Gary Birdsong on all aspects of plaintiffs' fraud claim and in favor of all

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[2] Plaintiffs' Motion in Limine; Defendants' Motion in Limine; Motion for Sequestered Voir Dire, Motion for Summary Judgment, and Motion for Partial Summary Judgment.

defendants on the conspiracy claim. The case went to the jury only on Foster and Sperau's fraud and suppression claims against Ford in connection with the capitalization and the sales and profits forecasts and Ford Motor Credit's contract claim against Foster, Dee-Witt Sperau, and Diane Sperau. The jury reached a verdict on February 23, 1994 as follows:

> "We the jury, find for the plaintiffs on their claim of fraud and assess damages as follows:
>
> 1. Compensatory damages
>
> | | |
> |---|---|
> | Economic loss | $ 992,000.00 |
> | Mental anguish for Samuel Foster, Jr. | $2,500,000.00 |
> | Mental anguish for Dee-Witt C. Sperau | $1,000,000.00 |
> | 2. Punitive damages | $6,000,000.00 |
>
> It is our intention to assess total damages in the amount of $10,492,000.00."

In addition, the jury found for the defendant Ford Motor Credit Company against plaintiffs Dee-Witt Sperau, Samuel Foster and Diane Sperau on the counter-claim of Ford Motor Credit Company and assessed damages in the amount of $635,000.00. At the request of the defendants, the trial judge polled each of the jurors, and each juror affirmed that the verdict was his or her verdict.

Ford Motor Company filed numerous post-trial motions and the trial judge conducted an extensive Hammond hearing on April 28-29, 1994.[3] The trial judge heard oral argument and received evidence on Ford Motor Company's motion for a new trial, motion for JNOV, motion for remittitur of damages and motion for review of punitive damages award.

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[3] The hearing was held in accordance with guidelines set out in *Hammond* v. *City of Gadsden*, 492 So.2d 1374 (Al. 1986); *Harmon* v. *Motors Insurance Corp.*, 493 So.2d 1370 (Ala. 1986); and *Alabama Farm Bureau Mutual Cas. Ins. Co.* v. *Griffin*, 493 So.2d 1379 (Ala. 1986).

On June 29, 1994, the trial court issued its order affirming the jury's verdict and denying Ford Motor Company's post-trial motions, with the exception of the motion for a new trial. The trial judge granted a new trial conditioned upon the plaintiff's acceptance of a remittitur of the mental anguish award for Dee-Witt Sperau to $200,000 and for Samuel Foster to $500,000. This remittitur was accepted by the plaintiffs on July 1, 1994. The total amount of judgment as remitted was $7,692,000.

On the same day, the plaintiffs filed their notice of appeal to this Court, based upon the trial court's dismissal in favor of Ford Motor Company and against Diane Sperau and Chandra Foster on their fraud claim, and the trial court's granting of a directed verdict on plaintiff's contract claim in favor of Ford Motor Credit Company and against Dee-Witt Sperau and Samuel Foster. On August 12, 1994, Ford Motor Company filed its cross-appeal. On August 16, 1994, Plaintiffs Dee-Witt Sperau and Samuel Foster filed their cross-appeal, seeking reinstatement of the jury's entire award for mental anguish.

Factual Background

In the 1960's the Ford Motor Company initiated a Minority Dealer Program. At the time the program was initiated, there were over 5,000 Ford and Lincoln-Mercury dealers in the country, with only 20 to 30 being operated by African-Americans. The Minority Dealer Program is a part of a larger program called the Ford Dealer Development Program. By the 1980's, the program's primary emphasis had turned to efforts to recruit African-Americans to become franchised dealers. Ford provides these minority "private capital" dealers with benefits that include special training and assistance from consultants. These "private capital" minority dealers may also apply for "launch costs" for opening the dealership and to a special parts return, under which Ford pays them in full for any obsolete or otherwise unwanted parts that are in their inventory a year and a half after the acquisition of the dealership.[4] Ford also has a "Dealer Development" program that requires the candidate for a dealership to raise 20% of the

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[4] Foster and Sperau received $19,800 in launch costs and $44,116.52 in supplemental parts return.

capital requirement. Because many minority candidates have difficulty raising the 20%, Ford can reduce the requirement to as low as 10%.

Each year, Ford management presents Equal Opportunity Progress Reports ("EOP Reports") to Ford Motor Company's board of directors, as a means of describing progress in achieving stated goals of the Minority Dealer Program. The EOP Reports show that, historically, the average return on investment for African- American dealers is lower than the average return on investment for all Ford and Lincoln-Mercury dealers. Ford management, through these reports, gained knowledge of material facts, regarding the historic performance of African-American dealers participating in Ford's Minority Dealer Program, and of factors bearing on the success and failure of these dealers. This information was not otherwise available to African-American dealers, unless Ford chose to reveal it to them.

The October, 1984, EOP Report reflected that as of August, 1984, the return on guide investment for all Ford and Lincoln-Mercury dealers was 53%, a record high, while the return for African-American dealers was 25%. The October, 1985 EOP Report, expressed the concern that a higher percentage of African-American dealers (34%), were in a loss position compared to the total dealer body (16%) at a time of record dealer profits in a strong automotive industry. In December, 1984, Ford issued a "Blue Letter" in which a goal of 320 African-American dealers by year-end 1989 was set by the Executive Vice-President of Ford's North American Operations, Harold Pohling. In order to accomplish this goal, district managers were assigned objectives for their sales districts, and this became a factor in the performance evaluations of Ford district managers and market representation managers. Beginning in October, 1985, Ford management began to actively recruit private capital African-American dealer candidates. The October, 1986, EOP Report acknowledged the difficulty of recruiting candidates with the required unencumbered capital of $350,000. The 1986 EOP Report also reflected that the year end return on guide investment for the black dealer body was 13%, compared to 39% for all Ford and Lincoln-Mercury dealers. Among the factors stated in the EOP Report as contributing to the differences in the performance of African-American dealers were

1) because many of the newly appointed dealers were relatively new to the business and lacked management experience; 2) that their dealerships were in the early stages of development and were still encountering start-up costs; and 3) that the more profitable dealerships of African-Americans had been in business longer than two years.

The EOP Report of October, 1987, states: "Because of the marginal profitability of newly appointed dealers, and our aggressive black dealer appointment target, we will continue to have a high number of black loss dealers until they have gained more retail experience." The EOP Report of October, 1988, states "... we can expect to have a high number of black loss dealers until they have gained more retail experience." That EOP Report also showed that for year-end 1987, the average return on guide investment for black dealers was 17%, which was 20% below the total dealer body. The EOP Report of October, 1989, stated:

> Black dealer profits declined from $16.7 million in 1987 to $11.2 million in 1988. During the first several months of 1989, black dealers lost $18.3 million compared with a $19 million profit during the same period in 1988, a year-over-year decline of more than $37 million.

As of July 31, 1989, 66% of all African-American Ford dealers were in a loss position.

It is undisputed that Ford did not disclose the facts reflected in the EOP Reports to its African-American dealer candidates. Instead, African-American dealer candidates were provided sales and profit forecasts, reflecting returns on investment for dealer points which, in this case, was as high as 65.4%. Ford management's decision to suppress the material facts was motivated by their objective to aggressively increase Ford's count of African-American dealers.

The testimony of Ford management was that Ford promoted the minority dealer program to enhance its corporate image and to increase sales. Ford recognized that the loss of African-American dealers was a problem not only for Ford, but for General Motors and Chrysler as well. The EOP Report of October, 1987, states: "While the percent of loss black dealers (23%) is higher than the national average, it does compare favorably to General Motors and

Chrysler (28%), despite the fact that General Motors and Chrysler have less aggressive appointment activity which should serve to lower their percent of loss black dealers." Ford management believed that it was significant to have more African-American dealers than did Chrysler and General Motors, based upon the perceived benefit of improved corporate image. The second objective Ford sought was an increase in sales. Ford's Manager of Dealer Operations for the Eastern United States, Robert Sullivan, testified that 12.5% of the population is African-American, while only 5% of the population are Ford customers.

Ford also profited from a continued market presence in less desirable geographic locations by arranging sales of dealerships to African-American dealer candidates in those locations. Ford Motor explained Ford Credit's loss "in part from the geographic and demographic disadvantages that many black dealers face because of geographic location."

In order to accomplish its goal of increasing the count of African-American dealers, Ford management assigned objectives to its district managers for their particular sales districts. Those objectives were a factor in the performance evaluations of Ford district managers and market representation managers.

In 1987, both plaintiffs were engaged in the construction business in North Carolina. Foster was the owner and general manager of Foster Construction Company. Sperau was the financial director and assistant general manager of the same company. Foster regularly attended monthly social gatherings of African-American professionals in the Charlotte area, known as "First Fridays." There, he frequently saw Cornelius Willingham, an employee in Ford's District Sales Office in Charlotte, North Carolina. Foster and Willingham discussed acquaintances who were successful minority dealers and Ford's Minority Dealer Program. Foster had some familiarity with the program by virtue of an article in Black Enterprise magazine. Foster testified that Willingham told him that the vast majority of African-American dealers participating in the program were making profits and receiving a good return on their investment.

Foster then received a call from Ken Cooper, Ford's Market Representation Manager for the Charlotte, North Carolina, District

Sales Office to arrange a meeting to discuss Ford's Minority Dealer Program. Foster testified that Cooper told him in their meeting that the majority of black dealers had been successful and profitable and had received a good return on their investment. Cooper gave Foster a dealership application.

In November of 1987, after submitting the application, Foster met with Mike Shanks, Ford Sales Manager for the Atlanta Region, and Ken Cooper. Since Foster had no experience in the automobile business, it was suggested that Foster take on an experienced partner to participate in the Minority Dealer Program. Following this meeting, Foster spoke with Dee-Witt Sperau, who had some experience in the industry.

In January, 1988, Sperau and Foster attended a meeting with Ken Cooper. Foster testified Cooper told them that a vast majority of the black dealers were successful and making a profit. Foster indicated a lack of interest in the minority dealer training program, because he did not want to leave his business in Charlotte to train full-time, and because his position on the Board of Trustees of the University of South Carolina required him to live in the judicial circuit from which he was elected. Cooper provided Sperau with a dealer application, which Sperau completed and submitted to Ford on January 20, 1988. Later that month, Foster and Sperau had a second meeting with Cooper to discuss the potential for a dealership opportunity in the Carolinas.

About that same time, Foster again spoke with Willingham, who had joined the Atlanta District Sales office. Willingham requested that Foster send him a copy of an Ebony magazine article, which named Foster as one of 30 influential young African-Americans. Willingham gave the article to Don Kitchens, the Atlanta District Market Representation Manager. Kitchens and his superiors were impressed by the article and by Foster and Sperau's resumes. Foster and Sperau were invited to a meeting in Atlanta where they met with Kitchens; Bill Stang, Ford's Atlanta district sales manager; and Dale Wendell, assistant district sales manager. Foster testified that at this meeting these Ford managers expressed to him that they were very serious about appointing African-American dealers in the Southeast. Don Kitchens admitted in his testimony that, during his recruitment of Foster, he probably told him that the vast majority of Ford minority dealers were

profitable. Foster repeated that he wanted to remain in the Carolinas.

Ford personnel found Foster and Sperau to be good dealer candidates: Foster had experience in banking, real estate, and the construction business. He was a graduate of the University of South Carolina and was the first African-American ever appointed to its Board of Trustees. Sperau had attended Benjamin Franklin University where he studied finance and accounting, graduating in 1968. He had worked in the automobile business in Rockville, Maryland, and worked for Ford Motor Company in dealer development, although for less than a year.

In February 1988, Foster received a telephone call from Don Kitchens, who stated that he knew that Foster wanted to stay in the Carolinas, but that there were good opportunities available in the Atlanta District and that a specific opportunity was available in Selma, Alabama, where a dealer had died. Kitchens sent a "sales and profit forecast" of the dealership by facsimile transmission to Foster. The profit and sales forecast showed a return on investment of 56% and contained a capital requirement of $632,000.00. Foster and Sperau visited the dealership, accompanied by Ronnie Bortnick, a friend of Sperau's, who owned a Maryland Ford dealership.

After the Selma visit, Sperau and Foster decided not to pursue the dealership. They called Kitchens and told him they were not interested because of the $632,000 capitalization requirement, because Selma was not in the Carolinas, and because the dealership could not support two families. Foster reiterated to Kitchens that they wanted a dealership closer to Foster's home. Kitchens then called Foster and told him he was sending a revised sales and profit forecast and capitalization requirement. The revised forecast reduced the capital the men would need to operate the dealership from $632,000 to $535,000 and increased the estimated return on capital from 56% to 65.4%. Foster testified that he questioned Kitchens concerning the differences between the two forecasts, and that Kitchens told him he had looked at the market again and that $535,000 would adequately capitalize the dealership and that Foster and Sperau could rely on the sales and profit forecast and capitalization requirement. Kitchens testified at trial that the revised forecast was based upon spending less money for the

acquisition of used cars than was projected in the first forecast. He also testified that he concluded the dealership would need less money for parts.

Foster and Sperau met again with Kitchens, Wendell and Stang in Atlanta to discuss the Selma dealership on March 1, 1988. At this meeting, the Minority Dealer Program was discussed and Stang encouraged Foster to secure the financing. Foster testified that Kitchens again assured him that the sales and profit forecast and capitalization requirement were reliable and asked him to go forward with investing in the Selma dealership.

On March 11, 1988, Sperau and Foster entered into a buy/sell agreement with the seller of the Selma dealership. Under the agreement, Foster and Sperau were not obligated to acquire the dealership and its property until they obtained Ford's approval and secured financing. They then sought the capital necessary to buy the dealership. They raised 50% of the necessary capital from their own funds, a loan from Foster's father, a loan from a friend, and a bank loan. They borrowed the remaining 50% of the capital, $285,000, from Ford Motor Credit Company.

On March 22, 1988, Don Kitchens arranged for Foster and Sperau to meet with Gary Birdsong and Arlen Williams of Ford Motor Credit's Dothan office. The purpose of the meeting was to discuss a loan for the River City dealership with Ford Motor Credit Company. This included $1,000,000 for a wholesale credit line; $400,000 for a mortgage loan to purchase the building; and a $320,000 capital loan to operate the business. Foster submitted the loan documents to Birdsong and Williams who were to perform the credit investigation and analysis for submission of the River City loan package to the Ford Credit office in Dearborn, Michigan. Birdsong recommended to this Ford Credit office that the River City application be rejected on the grounds that the tangible based capital and working capital appeared inadequate. The loan application had a numerical rating of -128 on a scale of +118 to -246. A Ford Credit staff operations manager, Mr. Cottingham, also recommended that the loan be rejected, as did his superior, Mr. Chadwick.

Ultimately, the executive vice-president of Ford Credit, Don Cook, prepared a memorandum rejecting the River City loan

application which had reduced the capital loan from $320,000 to $285,000, requiring additional investment by Foster and Sperau of $35,000.00. Neither Ford Credit nor anyone with Ford communicated to the plaintiffs that Ford Credit had rejected their application for a capital loan. Don Kitchens simply told Foster and Sperau that the dealership would be stronger if they put up an additional $35,000. At trial, Ford's Bill Stang admitted that he spoke with Don Cook at Ford Credit about the River City loan application. He submitted a cover letter with the appointment file for Foster and Sperau, recommending approval of the loan. On April 26, 1988, the capital loan was approved, however Ford Credit required that Foster, Sperau and their wives personally guarantee it.

Foster and Sperau obtained Ford's approval as operators of the dealership by agreeing that Foster would own a majority, 56%, of the stock, but would not run the dealership. Instead, he would come to Selma one week each month. Under that same agreement, Sperau was to operate the dealership on a day-to-day basis.

On May 11, 1988, the dealership began operations under the name "River City Ford." During the seven months of operation in calendar year 1988, River City Ford had gross profits of $102,682. In the second year of operation, River City Ford realized a loss of $4,124, despite posting new vehicle sales of $4,689,041 and parts sales of $463,108. By October 4, 1989, Ford Credit identified River City Ford as being in financial trouble and Ford Credit personnel requested permission to do a physical audit due to the poor financial condition of the dealership. By 1990, Sperau recognized that the dealership did not have enough capital to cover inventory to do business.

On March 8, 1990, River City Ford borrowed an additional $72,000 from Ford Motor Credit, taking the capital loan balance back to $285,000. River City Ford had a year-end loss of $6,347 for 1990 despite the fact that new vehicle sales were $4,689,114 and parts sales of $407,188. By January, 1991, the dealership was "out of trust" with Ford Motor Credit. Sperau and Foster met with Gary Birdsong and Arlen Williams from Ford Motor Credit in an effort to resolve the problem. Being unable to do so, River City Ford filed bankruptcy and the dealership was closed.

I.

We first address the issues presented by Ford's cross-appeal. Ford contends that the plaintiffs' theories of liability were not supported by substantial evidence. They cite the plaintiffs' theory of the case, as summarized by the trial court in its instruction to the jury on the plaintiffs' claims and defenses:

> "The plaintiffs claim that Don Kitchens, Dale Wendell and Bill Stang represented to the plaintiffs that the sales and profit forecast and capitalization requirements provided to the plaintiffs were reasonable and that the plaintiffs could rely on the numbers contained therein to make their decision to acquire the Selma Ford dealership.
>
> The plaintiffs say that these representations were made with the intent to deceive them, based upon Ford Motor Company's knowledge of the substantial likelihood of failure of Ford black minority dealerships within the first two years.
>
> The plaintiffs contend that under the facts of this case, Ford Motor Company was under a duty to disclose all material facts concerning the actual profitability performance of Ford's black minority dealers and the failure rates of such dealers, reflected on Ford Motor Company's own historical data collected with regard to Ford's black minority dealerships."

Our review of issues questioning the sufficiency of evidence begins with a presumption that a judgment based on a jury verdict is correct. *King Motor Co., Inc.* v. *Wilson*, 612 So.2d 1153 (Ala.1992); *White* v. *Fridge*, 461 So.2d 793, 794 (Ala.1984); *Alpine Bay Resorts, Inc.* v. *Wyatt*, 539 So.2d 160, 162 (Ala.1988). The strength of a jury verdict is based upon the right to a trial by jury. *King Motor*, supra. This court has noted the following regarding this presumption:

> "Upon review of a jury verdict, we presume that the verdict was correct; we review the tendencies of the evidence most favorably to the prevailing party; and we indulge such reasonable inferences as the jury was free to draw from the evidence. We will not overturn a jury verdict unless the evidence against the verdict is so much more credible and convincing to the mind than the evidence supporting the

> verdict that it clearly indicates the jury's verdict was wrong and unjust."

King Motor, at 1155 (citing *Campbell* v. *Burns*, 512 So.2d 1341, 1343 (Ala.1987). Thus, this Court will not reverse this judgment, based on a jury verdict, on the ground that the evidence was insufficient unless the evidence, when viewed in a light most favorable to Dee-Witt Sperau and Samuel Foster, indicates that the verdict was "plainly and palpably wrong and unjust."

In an action for fraudulent misrepresentation, there must be a 1) misrepresentation of material fact 2) concerning a material existing fact, which was 3) relied on by the plaintiffs 4) to their detriment. § 6-5-101, Ala. Code 1975; *Crowder* v. *Memory Hill Gardens, Inc.*, 516 So.2d 602 (Ala. 1987). To support a claim alleging suppression of a material fact, the plaintiff must offer substantial evidence 1) that the defendant suppressed a material fact 2) that the defendant had a duty to communicate that material fact, either because of a confidential relationship between the parties, or because of the particular circumstances of the case, and 3) that the plaintiff suffered actual injury as a result of the suppression. § 6-5-102, Ala. Code 1975; *Boswell* v. *Liberty Nat. Life Ins. Co.*, 643 So.2d 580 (Ala. 1994); *Interstate Truck Leasing, Inc.* v. *Bender*, 608 So.2d 716 (Ala. 1992).

Ford argues that there is no evidence that it failed to disclose a material fact or suppressed a material fact. We disagree. The trial judge made the following finding in his Hammond order:

> "There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive, based upon facts known to Ford. Other evidence provided, by a clear and convincing standard, a rational basis for the jury's punitive damages award. At the same time Ford management was aggressively recruiting black dealer candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers."

There is no dispute that the first profit and sales forecast provided by Ford to Foster and Sperau showed a projected return from the Selma dealership of 56%. The second, showed a 65.4% return. The first projected capital requirement was $632,000; the second was $535,000. The plaintiffs' expert, Dr. Charlie Carter, found the 65.4% return to be misleading. Even Ford's designated representative, Jim Ludlow, a Ford employee of 28 years described the change in the dealer investment to be "significant."

Robert Sullivan, a senior Ford executive who assisted in the preparation of the EOP Reports, admitted from the witness stand, as he read an excerpt from the 1987 EOP Report, that Ford knew that many African-American dealers would experience losses because of the marginal profits of newly appointed black dealers in Ford's aggressive black dealer appointment target:

> "Q. Read that bottom paragraph to the jury, please.
>
> "A. 'Because of the marginal profitability of newly appointed dealers in our aggressive black dealer appointment target we will continue to have a high number of black loss dealers until they gain more retail experience.'
>
> "Q. Was that true in November of 1987?
>
> "A. Yes.
>
> "Q. And did the management of Ford know that to be true?
>
> "A. Yes.
>
> "Q. That you had marginal profitability in newly appointed black dealers?
>
> "A. Yes, it says marginal profitability of new appointed dealers.
>
> "Q. Wasn't this referring to minority dealers?
>
> "A. Yes, it is. Also is true for non-minority dealers.

Ford argues that the representations made in this case were opinions, not representations of material fact. If there is proof of actual fraudulent intent at the time the representation is made, and the person succeeds in the deception and the injury results, an action for fraud may be predicated on such a representation, notwithstanding the opinion nature of the representation. *Reynolds*

v. *Mitchell*, 529 So.2d 227, 231 (1988). The question of intent is a matter for the jury. *Id.* This Court has recognized that where the facts are not equally known to both parties, a statement of opinion by one who knows the facts better, often involves a statement of material fact that justifies the opinion, such that an action for fraud may be predicated upon the statement. *Id.* Whether a statement is an expression of an opinion or a statement of fact depends upon all the circumstances of the particular case and the question should be left to the jury. *Joe Cooper & Associates, Inc.*, 614 So.2d 982 (Ala. 1992); *Boswell* v. *Coker*, 519 So.2d 493 (Ala. 1987).

In this case, there was substantial evidence from which the jury could conclude that Ford occupied a superior position with respect to historical information, as evidenced by the EOP Reports, which could predict future sales and profits. Additionally, Ford had established its own guidelines regarding initial capital requirements. The plaintiffs did not have this information at their disposal, and thus had to rely upon the statements made by representatives of Ford and Ford Motor Credit regarding the Selma dealership. The jury had substantial evidence before it concerning the aggressive recruitment of Foster and Ford's manipulation of the capitalization requirement and sales and profit forecasts.

II.

Ford argues that it had no duty to disclose "race-based" data and that such data was not material. The plaintiffs read the testimony of Robert Sullivan from the first trial of the case into the record. In it, Sullivan testified that if he were called upon to prepare a profit and sales forecast and/or capital requirement for a newly appointed African-American dealer, he would certainly take the fact that the dealer was a minority into consideration.

A duty to disclose arises if a confidential relationship exists between the parties or the particular circumstances of the case mandate disclosure. *First Alabama Bank of Montgomery, N.A.* v. *First State Insurance Co.*, 899 F.2d 1045 (11th Cir. Ala. 1990). The factors to be considered are the trust or confidence between the parties, the value of the particular fact, the relative knowledge and bargaining position of the parties, and other circumstances surrounding the transaction. *Jim Walter Homes, Inc.* v. *Waldrop*,

448 So.2d 301 (Ala. 1983). Furthermore, if the plaintiff is induced to take action that he otherwise would not have taken had there been full disclosure, the duty to disclose is more compelling. *Baker* v. *Bennett*, 603 So.2d 928, 935 (Ala. 1992).

Ford argues that Sperau and Foster were educated, sophisticated businessmen and that no confidential relationship existed between the parties, or from the particular circumstances. However, a confidential relationship may arise in a commercial setting, because when a party makes a representation, he is under a duty to make a full and fair disclosure. *First Alabama Bank*, supra. Ford had superior and historical knowledge regarding the expected performance of its new dealers. Ford sought out Foster and aggressively recruited him as a dealer. Ford represented that a 65.4% sales and profit forecast was reasonable and reliable when Ford knew that new minority dealers, as well as non-minority dealers were predicted to be loss dealers. The evidence in this case supports Ford's duty to disclose.

III.

Ford also argues that the plaintiffs signed two documents which Ford claims preclude them from establishing justifiable reliance as a matter of law. First, Foster and Sperau signed the forecast of sales and profits itself which states:

> "Forecast Sales and Profits are believed to be reasonable but cannot be guaranteed. Actual results will depend on managerial ability and future business conditions."

Second, at closing, they signed an application for sales agreement which contained this language:

> "I/we ... have determined to become an authorized dealer in [Ford] products and to make the investments necessary therefor, solely in reliance on my/our investigation and judgment of present and future conditions and expectations in my/our area and the industry and not in reliance on any statements made or documents exhibited to me/us by any representatives of Ford Motor Company, except for the following _____None_____ and such other statements or documents as may be specified by me/us in writing to Ford

> Motor Company prior to my/out execution and submission of [the] Sales Agreement."

In *Downs* v. *Wallace*, 622 So.2d 337 (Ala. 1993) this Court considered whether an integration or merger clause made reliance on representation outside of the written agreement unjustifiable as a matter of law, as Ford contends they did in this case. In *Downs*, the purchasers of a feed and seed business brought an action against the broker and his corporation for fraud, alleging that the broker had induced them to purchase the business by misrepresenting and suppressing facts about the former ownership, the income, and the profitability of the business. The trial judge granted summary judgment for the broker; we reversed and remanded on the grounds that the presence of an integration clause did not render the purchasers' reliance on alleged oral misrepresentations unjustifiable or unreasonable as a matter of law. We said in *Downs*:

> "Further, this Court has never held that an integration clause such as the one contained in the Downses' purchase agreement renders a party's reliance on oral representations unjustifiable, or unreasonable, as a matter of law. To the contrary, this Court has consistently held that although a written contract stipulates that there were no oral understandings not incorporated therein, such a stipulation does not foreclose a party, as a matter of law, from establishing his reliance on fraudulent representations that induced him to enter the contract." (Citations omitted.)

Id. at 341. In *Downs*, we quoted the reasoning of the Supreme Court of Massachusetts regarding the policy behind permitting a party to establish his reliance on another's fraudulent inducements, despite an integration clause in a written agreement:

> "'In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in

> one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in a multitude of frauds and in thwarting the general policy of the law.' *Bates* [v. *Southgate*], 308 Mass. 170, at 182, 31 N.E.2d 551, at 558 (1941)...."

Downs v. *Wallace*, supra at 341-342. See: *Harris* v. *M & S Toyota*, 575 So.2d 74 (Ala. 1991); *Reynolds* v. *Mitchell*, 529 So.2d 227 (Ala. 1988).

IV.

Ford argues that there was no evidence that Sperau and Foster justifiably relied on the non-disclosure of the race-based data. However, Ford sought out Foster and aggressively recruited him as a dealer. Ford represented that a 65.4% sales and profit forecast was reasonable and reliable when it knew that new minority dealers were predicted to be loss dealers. There is ample evidence that Sperau and Foster relied upon the data provided to them by Ford, and that Ford did not disclose the race-based data, of which Ford had superior knowledge. The standard for justifiable reliance in a fraud case has been stated as follows:

> "Reliance should be assessed by the following standard: A plaintiff, given the particular facts of his knowledge, understanding, and present ability to fully comprehend the nature of the subject transaction and its ramifications, has not justifiably relied on the defendant's representation if that representation is 'one so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth.'"

Southern States Ford, Inc. v. *Proctor*, 541 So.2d 1081, 1091-92 (Ala. 1989) (Hornsby, C.J., concurring specially) as quoted in *Hickox* v. *Stover*, 551 So.2d 259, 263 (Ala. 1989). The question of whether Foster and Sperau justifiably relied on the projections was properly submitted to the jury. The record reflects, as the trial judge stated in his Hammond order:

> "There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company

committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama."

The jury concluded that the Plaintiffs were induced to invest in the Selma dealership based on the fraudulent misrepresentations and suppressions of material facts committed by Ford and therefore damages were due to be awarded.

V.

Ford contends that the plaintiffs failed to establish that the failure of the dealership was the proximate result of the alleged misrepresentations and suppression of material fact. The company contends that the demise of the dealership was the result of severe mismanagement. Ford claims that Sperau and Foster drained capital out of the business by using the capital to pay a wide range of personal expenses, by taking higher salaries than Ford had projected, and by paying off Foster's tax liability from an unrelated business.

The plaintiffs counter that this argument is based on an erroneous characterization of the damages decided by the jury. The plaintiffs argue that the proper jury instruction was given as follows:

"Now in this case plaintiffs claim as compensatory damages, monies obtained from third parties and which monies are owed by them. The plaintiffs say these monies were borrowed to capitalize the Selma-Ford dealership and were used in the business. In this regard, expenses incurred as a result of a fraudulent misrepresentation may be recovered. A party may recover all damages which were within the contemplation of the parties or which were necessary or natural and proximate consequences of the fraud."

Ford did not object to this instruction. It thus became the law of the case. *Marshall Durbin Farms, Inc.* v. *Landers*, 470 So.2d 1098, 1102 (Ala. 1985).

VI.

Ford also claims that even if the plaintiffs have adduced sufficient evidence to support their misrepresentation and suppression claims, the theory upon which those claims rest,

conflicts with federal law and is therefore preempted under the Supremacy Clause of the United States Constitution. Ford claims that an award of damages under state common law may be subject to conflict preemption if it effectively requires behavior that would be prohibited under federal law. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Ford argues the plaintiffs' claims boil down to the contention that Ford should have inflated the capital requirement and concomitantly reduced the projected return on investment because Foster is an African-American. Ford contends that this verdict would require Ford to do precisely what 42 U.S.C. § 1981 prohibits, offer dealerships to black applicants on less favorable terms than are offered to white applicants.

We reject this contention, because it is premised upon an erroneous characterization of the verdict in this case as requiring a higher capitalization for a black dealership than a white dealership. The verdict in this case was based upon the plaintiffs' state action for fraud. The fraud claim is not preempted by federal law. In addition, Ford's preemption argument was never raised in the trial court, and thus has been waived. Federal preemption must be affirmatively pleaded in order to avoid waiver. *International Longshoremen's Ass'n* v. *Davis*, 470 So.2d 1215 (Ala. 1985).

VII.

Ford argues further that venue was not proper in Lowndes County, Alabama. In the original complaint, the plaintiffs alleged that the defendants Ford Motor Company and Ford Motor Credit Company were foreign corporations doing business in Lowndes County, Alabama, at all times material to the averments of the complaint which included a cause of action for breach of contract. Ford Motor and Ford Credit admitted that they were foreign corporations doing business within Lowndes County in their answer to the complaint. In the first trial of this case, the trial judge granted a directed verdict for the defendants as to the contract claim. Ford contends that once this occurred, there was no contract claim to which the other claims could be "joined" to preserve venue in Lowndes County for the second trial.

There is no merit to this argument, because the question of proper venue is to be determined as of the time the action is filed. Rule 82(b)(1)(a), A.R. Civ. P.; *Ex parte Maness*, 386 So.2d 429

(Ala. 1980); *Ex parte Wilson*, 408 So.2d 94 (Ala. 1981); *Ex parte Smith*, 423 So.2d 844 (Ala. 1982); *Elmore County Com'n* v. *Ragona*, 540 So.2d 720 (Ala. 1989).

VIII.

Ford next argues that the trial court erred to reversal in admitting certain evidence by plaintiffs' economic expert, Dr. Charlie Carter. Ford specifically questions the evidence presented by Dr. Carter concerning the termination ratio for minority dealers, i.e. the percentage of black Ford dealers who went out of business. While admitting that Dr. Carter does appear to have taken the year-end numbers of minority-owned dealership directly from the EOP Reports, Ford states that Dr. Carter's figures on the number of dealers appointed each year are not in the report or other evidence introduced at the trial.

However, Ford did not preserve this issue by making a timely objection to the testimony. *Macon County Com'n* v. *Sanders*, 555 So.2d 1054, 1058 (Ala. 1990); *Mead Coated Board, Inc.* v. *Dempsey*, [Ms. 1921827, April 29, 1994] 644 So.2d. 872 (Ala. 1994). The record reflects that counsel for Ford objected to Dr. Carter's testifying in a narrative fashion, however there was no objection to the content of his testimony. Instead, Ford conducted an extensive cross-examination of Dr. Carter and presented the testimony of Robert Sullivan, Ford's Manager of Dealer Operations for the Eastern United States, to refute the evidence Dr. Carter had presented. Ford offered into evidence a chart which was a replica of the diagram utilized in the examination of Robert Sullivan relating to Dr. Carter's figures. Four days after Dr. Carter had testified, Ford filed a hand written motion for mistrial or, in the alternative, to strike exhibit with instructions. The trial court responded to this motion by stating that the jury would be instructed concerning the weight, if any, to be given to the testimony of experts. The jury was properly instructed. Ford cannot now complain that Dr. Carter's testimony should have been excluded. *Mead Coated Board, Inc.* v. *Dempsey*, supra.

IX.

Finally, Ford contends that there was insufficient evidence to support the imposition of punitive damages, and that the award of punitive damages was excessive. Applying the principles of law

this Court adopted in *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil Co.*, v. *Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989) and following the provisions of Section 6-11-23(b), Code of Ala. 1975, the trial judge held a hearing, and issued a well- prepared order, stating the reasons why he concluded that the punitive damages awarded in this case were due to be imposed and were not excessive:

> "The parties in this case were all represented by able counsel who represented their clients in a competent manner. The jury represented a fair cross section of the community based upon the factors of race, age, and gender. During the course of deliberations, the jury requested additional instructions and deliberated several hours before reaching its verdicts in favor of the Plaintiffs and Ford Motor Credit Company. The jury was polled and each juror responded that the verdicts were their verdicts. The Court is satisfied that the jurors carried out their duties in a conscientious manner and that, except for the question of excessiveness of the mental anguish awards, the verdicts in this case were rendered by a properly functioning jury. There was no evidence before the Court of any misconduct, bias, passion, prejudice, corruption, or improper motive by the jury. The Court considers the fact that the jury returned a verdict of $635,000.00 in favor of Ford Motor Company's wholly owned subsidiary Ford Motor Credit Company, significant. It means the jury considered the law and evidence pertaining to all parties.
>
> ...
>
> Punitive Damages
>
> "Commencing on April 28, 1994 this Court conducted a hearing to consider the excessiveness of the $6 million punitive damages awarded in this case in accordance with *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Green Oil Co.*, v. *Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989); and the provisions of Section 6-11-23(b), Code of Alabama, 1975.
>
> "This Court has determined that the punitive damage verdict rendered in this case is not due to bias, passion, prejudice, corruption, or other improper motive. Notwithstanding the fact that an award of punitive damages is made by a properly

functioning jury, it may nevertheless be excessive if it exceeds the amount necessary to accomplish the purposes of punitive damages. The purpose of a punitive damage award is not to compensate the Plaintiffs but the focus is on punishing the wrongdoer and deterring others from committing similar wrongs in the future. *Green Oil*, *supra*, 539 So.2d at 222. Ford contends that the punitive damage award in this case exceeds the amount necessary to accomplish these purposes.

"The issue to be decided, then, is whether under the facts of this case the punitive damage award of $6 million exceeds an amount that will punish the defendant and deter the Defendant and others from committing similar wrongs in the future. The constitutional protection of the jury's award of punitive damages may only be disturbed if it is so excessive or out of proportion to the wrong committed by the Defendant as to violate the Defendant's rights not to be deprived of property without due process of law. *Henderson* v. *Alabama Power Company*, 627 So.2d 878, 893 (Ala. 1993).

"The Alabama Supreme Court and the Legislature have identified several non-exclusive factors which this Court may consider bearing on the question of the excessiveness of a punitive damages award. In considering these factors it is the decision of this Court that a punitive damages award of $6 million in this case is not excessive. In making its decision this Court has considered each of the numerous factors suggested by the Alabama Supreme Court in its decisions and the Alabama Legislature in its statute. The Court has also considered the United States Supreme Court's recent decisions in *Haslip* and *TXO* considering pertinent factors. In accordance with the procedure established in *Hammond*, the reasons for declining to disturb the jury's punitive damage award are stated hereinafter.

"There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama. Accordingly, this Court finds that the actual harm suffered by the Plaintiffs

due to the Defendants' fraudulent conduct and its duration supports the jury's punitive damages award in this case.

"There was also evidence from which the jury could determine, by a clear and convincing standard, that the deception of the Plaintiffs was committed with Ford's knowledge of the financial condition of the Plaintiffs, their degree of experience, the profitability and loss experience of black dealers participating in the Minority Dealer Program under circumstances similar to the Plaintiffs, and the economic impact the failure of the dealership would have on the Plaintiffs. Having considered the evidence bearing on the issue of the intentional misconduct engaged in by Ford with regard to the Plaintiffs, this Court finds that such evidence supports the amount of punitive damages awarded by the jury.

"This Court has considered the issue of the impact of the punitive damages verdict on innocent third parties. Ford emphasizes its good intentions in recruiting black dealer candidates to participate in its Minority Dealer Program. Ford suggests that the punitive damages verdict in this case will have a detrimental effect on this Program and those participating now in the Program and those candidates who would participate in the Program in the future. During the *Hammond* hearing, this Court heard testimony from the Ford executive responsible for the Minority Dealer Program that to provide negative information to black dealer candidates would discourage their participation in Ford's Program.

"There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive based upon facts known to Ford. Other evidence provided, by a clear and convincing standard, a rational basis for the jury's punitive damages award. At the same time Ford management was aggressively recruiting black dealer candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers.

"Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, the end of meeting an extremely aggressive black dealer count does not justify the perpetration of an intentional fraud. This Court is also not persuaded that Ford's only alternative to suits of this nature is to stop its minority program. Disclosure of the failure rate of "all" new dealers along with a disclosure of the cyclical nature of the business would certainly be a start toward correcting the problems complained of here.

"Another of the factors to be considered is whether the Defendant profited or received a benefit from its misconduct. Ford derived a substantial benefit from its recruitment of black dealer candidates including the Plaintiffs. Ford management stated in the October, 1987 Equal Opportunity Progress Report that i[t]s black dealerships had sales of Ford products amounting to $1 billion. The corporate benefit of the black dealer body in dollars to Ford is significant. The Plaintiffs point out that River City Ford sold approximately $15 million in Ford products. They also maintain that the black dealer program provided Ford the added benefits of positive corporate image and a means of keeping dealerships in less desirable geographic locations in business.

"Ford's 1993 Form 10-K indicates that Ford Motor Company had an annual net income of approximately $2.5 billion for 1993 and assets approaching $200 billion. Additionally, Ford management testified during the *Hammond* hearing that the $ 6 million punitive damages award will have no effect on Ford's continued operation. This Court also notes that the United States Supreme Court affirmed a punitive damages award of a West Virginia jury in the amount of $10 million against *TXO*. In *TXO* the Plaintiff estimated that TXO had a net worth of between $2.2 billion and $2.5 billion, a net worth equivalent to Ford Motor Company's net income for 1993. *TXO Production* v. *Alliance Resources*, 125 L.Ed.2d 366, 374 n.9 (1993).

"A $6 million punitive damages verdict against Ford Motor Company is not excessive under the facts of this case, given the financial position of Ford Motor Company. This is

particularly so when the $ 6 million punitive damage award in this case is compared to larger punitive damages awards affirmed by the Alabama Supreme Court in similar fraud cases against corporate defendants which do not have either the assets or income of Ford Motor Company.

"Another factor considered in sustaining the jury's punitive damages award in the Plaintiffs' costs of litigation. Plaintiffs expended considerable resources in time and money to prepare and try this case. A reduction of the jury's punitive damages award in this case would discourage plaintiffs undertaking such litigation due to the substantial costs required."

We adopt the well reasoned *Hammond* Order of the trial judge as our own. The trial judge has weighed the factors previously set forth by this Court and by the Alabama legislature and has determined that a punitive damages award of $6 million in this case is not excessive. In addition, at the *Hammond* hearing, the plaintiffs presented Ford's Form 10-K filed with the Securities and Exchange Commission for the year ending December 21, 1993, as evidence of the economic impact of the verdict on Ford. The Ford Form 10-K shows that for the year ending 1993, Ford Motor Company had total assets of $198 billion, and the automobile division of Ford realized a net income of $940 million. The presumption of correctness of a jury verdict, extends to the jury's punitive damage award. *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala.1991).

X.

We now consider the plaintiffs' appeal in this case. First, the plaintiffs aver that the trial court erred in directing a verdict in favor of Ford Motor Credit Company and Ford Motor Company on the plaintiffs' contract claim. Ford contends that the plaintiffs cannot raise this issue as to Ford Motor Company, because their notice of appeal from the directed verdict names only "FMCC" or Ford Motor Credit Company. We agree. It is settled law that notice of appeal from a judgment in favor of two or more parties must specifically name each party whose judgment the appellant wishes to overturn. Rule 3(c), A.R.App. P.; *Edmondson* v. *Blakey*, 341 So.2d 481 (Ala. 1976); *Threadgill* v. *Birmingham Board of Education*, 407 So.2d 129, 132 (Ala. 1981) quoting *C.A.*

May Marine Supply Co. v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.1981), *cert. denied*, 454 U.S. 1125 (1981).

XI.

Next, we consider the claims of plaintiffs Chandra Foster and Diane Sperau, the wives of Sam Foster II and Dee-Witt Sperau. The wives claim that, as a result of Ford's misrepresentations, they signed personal guaranties for the capital loan and the floor plan funds extended by Ford Credit. The wives appeal from the entry of summary judgment in favor of Ford Motor Company and Ford Motor Credit on their claims. The record reflects that the trial judge submitted Ford Credit's counterclaim on its guaranties to the jury, instructing it as follows:

> "If you are reasonably satisfied from the evidence that Dee-Witt Sperau, Diane Sperau and Samuel R. Foster, II, were induced by fraud, as defined to you by the court, to enter into the promissory notes and guarantees made the basis of Ford Motor Credit Company's counterclaim and that they were damaged or will suffer damage in the future therefrom, then Dee-Witt Sperau, Diane Sperau and Samuel R. Foster are not liable on the counterclaim and you should so find."

The jury rendered a verdict in favor of Ford Credit on its counterclaim and assessed damages in the amount of $635,000.00, thus necessarily finding that Ford Credit had not committed fraud on either the husbands or the wives with respect to the guaranties. Thus, the verdict is res judicata as to these claims.[5] *Turner* v. *Green*, 571 So.2d 1104, 1106 (Ala. 1990).

XII.

Finally, we consider Foster and Sperau's cross-appeal contending that the trial court erred in granting a remittitur of the jury's award to them for mental anguish. In his order of June 19, 1994, the trial judge granted a remittitur of Sperau's mental anguish award from $1 million to $200,000 and of Foster's mental anguish award from $2.5 million to $500,000, stating as follows:

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[5] Ford Credit Company released Chandra Foster from the guaranty.

"The jury awarded damages for mental anguish to Samuel R. Foster, II, in the amount of $2,500,000.00. The jury returned a verdict awarding damages for mental anguish in favor of Dee-Witt C. Sperau in the amount of $1,000,000.00. The jury heard testimony of the Plaintiffs, Plaintiffs' wives, and Plaintiff Foster's father which related to the Plaintiff's humiliation, shame and wounded pride. There was some additional evidence before the jury from which it could be inferred that Plaintiff Foster's humiliation and shame would be greater than Plaintiff Sperau's because of his reputation, and because of additional family relationships being affected. Neither Plaintiff presented evidence of any need for counseling or mental health care or that either Plaintiff was unable to cope with the stress and grief resulting from their situation. No evidence was presented from any expert or healthcare professional that either Plaintiff was suffering from a serious emotional disorder as a result of their experiences.

"Plaintiffs wish to rely on the fact that substantial amounts of monies were involved which justify the enormous award for mental anguish. This court does not believe the amount of money involved is the guiding factor in determining the amount of mental anguish, rather the feelings and mental condition of the Plaintiff should be [a] guiding factor. Indeed, the loss of a single weekly or monthly paycheck to a person of insubstantial means may cause as much mental anguish as a multi-million dollar loss would to one of substantial means. Also, a person of substantial means, with a good education, and with broad business experience may be better able to handle the frustration than one who was not so educated and experienced. This Court also notes that there were other factors in evidence which could have exerted a certain amount of mental suffering on these Plaintiffs which was unrelated to the actions of the Defendants.

"These Plaintiffs filed suit three months after River City Ford closed its doors and in view of the scant evidence of mental anguish or suffering by both Plaintiffs, the award totalling $3.5 million for mental anguish are excessive and should be remitted. This court considers that a remittitur of excessive damages for mental anguish by this court is warranted and

justified by similar action taken by the Supreme Court of Alabama on compensatory damage awards involving mental anguish in the cases of *Sears, Roebuck and Co.* v. *Harris*, 630 So.2d 1018, 1034 (Ala. 1993) and *Foster* v. *Life Insurance Co.*, __ So.2d __, 28 A.B.R. 1152 (Ala. Jan. 14, 1994).

"In short, the Court is shocked by the size of the verdicts for mental anguish in view of the evidence presented at trial. This Court considers $100,000.00 would be adequate for Sperau and $250,000.00 would be adequate for Foster. However, the Court considers that a properly functioning jury could have awarded a maximum of $200,000.00 for mental anguish to Plaintiff Sperau and a maximum of $500,000.00 for mental anguish to Plaintiff Foster.

..."

This Court has said that the trial court has much discretion in determining whether to grant a new trial and to require a remittitur of damages for mental anguish. *Crown Life Ins. Co.* v. *Smith*, [Ms. 1930120 (August 5, 1994)] __ So.2d __ (Ala. 1994):

"The trial court has much discretion in determining whether to grant a new trial and, in that regard, whether to require a remittitur. *Fields* v. *Parker*, 361 So.2d 356 (Ala.1978). Given that discretion, the trial court's ruling on a new trial motion is presumed to be correct. *Todd* v. *United Steelworkers of America*, 441 So.2d 889 (Ala.1983); *Birmingham Electric Co.* v. *Thompson*, 251 Ala. 465, 37 So.2d 633 (1948)."

Id. While recognizing that "there is [no] yardstick to measure the amount of recompense which should be awarded for ... mental suffering," *Birmingham Elec. Co.*, 251 Ala. at 466, 37 So.2d at 634, the trial judge has carefully reviewed the evidence presented by the plaintiffs concerning their claim for mental anguish. We find no abuse of discretion on his part in remitting these two awards for mental anguish, based upon the evidence before him.

Based on the foregoing, we are of the opinion that the judgment of the trial court, including the damages award, and the remittitur of the damages for mental anguish, is due to be, and it hereby is, affirmed.

AFFIRMED.

ALMON, SHORES, KENNEDY, INGRAM, COOK, and BUTTS, JJ., concur.

MADDOX and HOUSTON, JJ., dissent.

HOUSTON, Justice (dissenting).

I am concerned about the effect on the vision of this nation of the tort theories advanced by the plaintiffs in this case-(1) the fact that a person is a member of a racial minority impairs that person's ability to compete, and (2) that businesses that offer minorities the opportunity to compete without disclosing that alleged racial handicap can be liable for compensatory and punitive damages if a member of that minority enters a business and fails.

I am concerned because I do not believe that a person's race impairs his ability to compete, and if we base tort liability on this false premise, we "attempt the Future's portal with the Past's blood rusted key."[6]

Mel Farr, chairman of the Ford Lincoln-Mercury Black Dealers Association, testified in this case that qualified minority applicants should have "an opportunity to participate in the ... free enterprise system that says you have the right to fail and you have the right to succeed." Farr further testified that, in his opinion, it is insulting to suggest that race has anything to do with that success or failure in a business venture.

There are tens of thousands of franchised new car dealerships in this country that generate hundreds of billions of dollars of annual sales. The automobile industry, through its franchises, is a major source of small business opportunities in this country. I am concerned that the jury verdict in this case could have a significant negative impact on this country's efforts to make "equal opportunity" a reality of the American economy.

However, this is a dissenting opinion; and there was evidence that certain Ford employees represented to the plaintiffs that sales and profit forecasts for the existing Selma Ford dealership that the plaintiffs had purchased were reasonable, and suppressed or

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[6] James Russell Lowell, The Present Crisis.

misrepresented the capitalization requirements needed to acquire and successfully operate the existing dealership (*Rodopoulos* v. *Sam Piki Enterprises, Inc.*, 570 So.2d 661 (Ala.1990)). Therefore, without further discussion of whether the defendant had any initial legal liability based upon the theories expressed in the first paragraph of this dissent, I address the issue of punitive damages.

In *Henderson* v. *Alabama Power Co.*, 627 So.2d 878 (Ala.1993), a majority of this Court held that the legislation that imposed a $250,000 cap on punitive damages (Ala. Code 1975, § 6-11-21) violated the right to trial by jury guaranteed by § 11 of the Constitution of Alabama of 1901. In my dissent, I wrote:

> "However, if the trial court is the trier of the facts, then punitive damages cannot exceed $250,000 unless the punitive damages award is based on one of the three exceptions listed in [Ala.Code 1975,] s 6-11-21, because clearly what the trial court does as trier of the facts is in no way affected by s 11 of the Constitution....
>
> "The people spoke through their legislature in 1987. The people spoke after all sides had been heard. The best and the brightest advocated or opposed a fixed limitation on punitive damages. What is now § 6-11-21 was legally adopted by a duly elected legislature, and it was approved by a duly elected governor. This was representative democracy at work. If excessiveness of a punitive damages award is raised, should not I, as an appellate court judge, treat $250,000 as the outer limit of what society deems necessary in the way of punishment and deterrence for civil wrongs (except those for which the limit was not made applicable). As the author of *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala.1989), I believe that a $250,000 limitation should be factored into the *Green Oil Co.* standard of review. The legislature can by general act change rules adopted by this Court. Section 6.11, of Amendment 328, Alabama Constitution."

627 So.2d at 914.

Subsequently, the United States Supreme Court in *Honda Motor Co., Ltd.* v. *Oberg*, ___ U.S. ___, ___, 114 S.Ct. 2331, 2342 (1994), held: "A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that

must comply with the Due Process Clause of the Fourteenth Amendment." Honda further provided: " ' "[P]rocedural due process" requires judicial review of punitive damages awards for reasonableness....' " ___ U.S. at ___, 114 S.Ct. at 2335, quoting *TXO Production Corp.* v. *Alliance Resources, Corp.*, 509 U.S. , 113 S.Ct. 2711 (1993); and, in effect, held that a 1910 amendment to the Oregon Constitution, which prohibited judicial review of the amount of punitive damages awarded by a jury unless the Court could affirmatively say there was no evidence to support the verdict, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Who sets the outer limit of reasonableness of a punitive damages award? In cases such as the case before us there is a legislative pronouncement that "[a]n award of punitive damages shall not exceed $250,000." See § 6-11-21. When the legislature has set a maximum punitive damages award that may be imposed upon a defendant in a case, can the judiciary, in accordance with the Due Process Clause of the Fourteenth Amendment, ignore that legislative mandate? Can the judiciary, in accordance with the Equal Protection Clause of the Fourteenth Amendment, enforce $250,000 as the outer limit of reasonableness on punitive damages awarded by a trial judge in a case tried without a jury, but ignore that outer limit of reasonableness in its review of jury verdicts? If the judiciary does ignore that outer limit of reasonableness in the review of jury verdicts, would this not subject § 11 of the Alabama Constitution to constitutional challenge under the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution?

It is the basic function of the legislature to establish this state's public policy. See *Almon* v. *Morgan County*, 245 Ala. 241, 245, 16 So.2d 511, 514 (1944) ("the Legislature prescribes the State's policy; the courts do not"). See, also, *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1, 9-10, 18 So.2d 810, 815 (1944), *cert. dismissed*, 325 U.S. 450 (1945).

Historically the power to punish for criminal behavior in this country has rested in elected legislative bodies.

> "The power to prescribe the penalty to be imposed for [the] commission of a crime rests with the legislature, not with the

> courts. This power is not a special grant or limited authority; it is part of the sovereign power of the state to maintain social order and to take life and liberty and the rights of both when necessary. As the Supreme Court has stated, whatever views may be entertained regarding the severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy.
>
> "The power of a legislative body with respect to punishment for crime is practically unlimited, and is controlled only by constitutional provisions. Subject to this qualification, the legislature may fix the punishment for crime as it sees fit, and where a particular punishment is prescribed, no other may be imposed."

21 Am.Jur.2d *Criminal Law* § 589 (1981). See, also, *Rummel* v. *Estelle*, 445 U.S. 263 (1980); *Albernaz* v. *United States*, 450 U.S. 333 (1981); *Jones* v. *Thomas*, 491 U.S. 376 (1989). In Alabama, the legislature sets the punishment for criminal offenses. See Ala. Code 1975, §§ 13A-5-6, -7, -9, - 11, -12, -13, and -39 et seq; see, also, *Ex parte Giles*, 632 So.2d 577 (Ala. 1993), cert. denied, 114 S.Ct. 2694 (1994). In fulfilling this function, in accordance with Article I, § 35, of the Alabama Constitution of 1901, the legislature determines the extent to which the state can be allowed to deprive a person convicted of a criminal offense of his property, including a person convicted of the most egregious criminal act. By way of example, a person convicted of a class A felony, such as murder under § 13A-6-2, may be fined an amount not exceeding $20,000, or "[a]ny amount not exceeding double the pecuniary gain to the defendant or loss to the victim caused by the commission of the offense." Section 13A-5-12(a)(1) and (a)(4). In Alabama, juries imposed fines and fixed sentences at the time of the ratification of the Constitution of Alabama of 1901. If a jury imposed a fine in excess of the legislatively prescribed maximum fine, would this not have been a violation of the Due Process Clause of the Fourteenth Amendment? Subsequent to the ratification of the Constitution of 1901, the legislature removed from the jury the right to impose fines and to fix sentences and empowered the trial court to do so. If a trial court were to impose a fine in a criminal case in excess of that prescribed in the sections of the Code cited above, would this not violate due process under the Fourteenth Amendment? If an

appellate court should affirm a judgment imposing such a fine, would that not violate due process under the Fourteenth Amendment?

"A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." (Emphasis added.) *Honda*, ___ U.S. at ____, 114 S.Ct. at 2342. In fulfilling its policy-making role on the civil side of the law, the legislature has determined that $250,000 is the maximum "reasonable" amount of punitive damages that should be awarded in fraud cases, such as the present one, where no pattern or practice of wrongful conduct has been shown. § 6-11-21. A majority of this Court in Henderson, supra, held that § 6-11-21 was unconstitutional under Article I, § 11, of the Alabama Constitution of 1901, to the extent that it set a limit on the amount of punitive damages that could be awarded by a jury in a particular case. I am aware of no decision from this Court holding that the expression of policy set out by the legislature in § 6-11-21 violates the separation of powers provision of the Alabama Constitution of 1901, Article III, § 43.[7] Therefore, in cases where the trial court acts as the factfinder, punitive damages cannot exceed $250,000, unless the punitive damages award is based on one of the three exceptions listed in § 6-11-21, because clearly what the trial court does as a factfinder is in no way affected by § 11 of the Alabama Constitution. Thus, the $250,000 statutory limit is no less a viable expression of this state's public policy following *Henderson*. This Court, in its exercise of supervisory appellate jurisdiction over jury verdicts, is bound by the Fourteenth Amendment and Article VI (the Supremacy Clause) of the United States Constitution to conduct a "meaningful" review of jury verdicts awarding punitive damages. This Court simply cannot fulfill this constitutionally mandated responsibility without recognizing that the legislature, acting within its policy-making power, has determined that $250,000 is the maximum reasonable amount of punitive damages that should be awarded in fraud cases like this one.

---

[7] By mentioning this, I do not mean to suggest that § 6-11-21 in any way violates Article III, § 43, of the Constitution.

From my perspective as an Associate Justice of the Supreme Court of Alabama, and after struggling many years to bring some "rhyme or reason" to the process by which punitive damages awards are reviewed on appeal, I have concluded that it is a violation of the Fourteenth Amendment for this Court, in attempting to fulfill its constitutionally mandated responsibility of conducting a meaningful review of punitive damages awards, to ignore the public policy of this state expressed in § 6-11-21, and to affirm an award of punitive damages in excess of $250,000, when none of the exceptions listed in § 6-11-21 apply. Justice Hugo Black, writing for a majority of the Court in *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966), noted that "one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." In my view, the majority's decision here is no less objectionable under the Fourteenth Amendment than would be a decision from this Court, or from the Court of Criminal Appeals, upholding punishment in a criminal case in excess of the legislatively prescribed punishment for the offense charged. See *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980).

Time and again this Court has held that a plaintiff has no right to punitive damages. See, e.g., *Meighan* v. *Birmingham Terminal Co.*, 165 Ala. 591, 51 So. 775 (1910); *Comer* v. *Age-Herald Publishing Co.*, 151 Ala. 613, 44 So. 673 (1907). Therefore, in addressing punitive damages, "the sole object and only legitimate end of [both the legislative and judicial departments of] government is to protect" the property interests of civil defendants in cases where punitive damages are sought; and when the judicial department ignores legislative policy with respect to the outer limit of punitive damages that can be awarded in tort cases, it has exceeded the "sole object and only legitimate end of government," and, in accordance with Article I, § 35, of the Constitution, it has engaged in "usurpation and oppression."

For the foregoing reasons, I respectfully dissent from that portion of the majority opinion affirming the jury's award of punitive damages in the amount of $6,000,000. I would remit the punitive damages award to $250,000, in accordance with the established policy of this state. MADDOX, J., concurs.

APPENDIX C

IN THE CIRCUIT COURT OF
LOWNDES COUNTY, ALABAMA

DEE-WITT C. SPERAU, et al.,	*	
Plaintiffs,	*	
v.	*	CASE NO. CV-91-34
FORD MOTOR COMPANY, et al.,	*	
Defendants.	*	

ORDER

This case comes before the Court on the post-trial motions of the parties arising from a jury verdict rendered on February 24, 1994 in favor of the Plaintiffs against the Defendant, Ford Motor Company. On February 28, 1994 Plaintiffs filed their Motion for Punitive Damages hearing; on March 2, 1994; this Court entered judgments on the jury verdicts; and on March 31, 1994, the Defendant, Ford Motor Company, filed its Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, Motion for Remittitur of Damages, and Motion for Review of Punitive Damages Award.

Ford's post-verdict motions challenge the validity of the jury verdicts; therefore, this Court must determine whether Ford is entitled to judgment nothwithstanding the verdict or a new trial based upon the facts of this case and the grounds stated by Ford in its post-trial motions. *Fuller* v. *Preferred Risk Life Insurance Company* 577 So.2d 878, 883-885 (Ala. 1981). In the event Ford is not entitled to judgment notwithstanding the verdict or new trial, Ford seeks a remittitur of compensatory and punitive damages awarded by the jury in favor of Plaintiffs and against the Defendant.

These motions were all heard by this Court on May 28th and 29th of 1994 and evidence was presented at that time in connection with the punitive damages award. The parties have also submitted excellent briefs and arguments to the Court for consideration on all matters, submitted to it. At the hearing this Court reserved its ruling on the admissability in the *Hammond* hearing of the trial testimony of Emmett Mitchell and Carvel Simmons from a former trial in this case. The Court upon consideration thereof has determined that such testimony is inadmissable and has not considered the testimony for any purpose.

The Plaintiffs requested a trial by jury of the issues in this case at the time they filed their Complaint. The right to a trial by jury is guaranteed under Alabama law by Article I, Section 11 of the Alabama Constitution of 1901. This constitutionally protected right applies both to the jury's determination of liability and also to the fixing of damages.

This Court was not the fact finder in this case but rather the jury was instructed and performed its duty to determine what the true facts were. This Court does not necessarily agree with all the factual findings of the jury, nor is it required to do so. Indeed, this Court may well have determined otherwise than did the jury concerning both the fraud claim and the suppression claim on which this case went to the jury. However, based upon a consideration of the law applicable to the Plaintiffs' claims, the evidence presented in the trial of this case, the grounds stated in Ford's Motion for Notwithstanding the Verdict and Motion for New Trial, and the arguments of the parties, it is the determination of this Court that with the exception of the question of remittitur which are separately addressed hereafter, Ford's Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial are due to be denied.

Due to the aforementioned determination, this Court must now consider the issue of excessiveness of damages awarded by the jury in this case. In its Motion for Remittitur of Damages, Ford contends that the jury's award for mental anguish is excessive. As to the punitive damages, Ford maintains that the punitive damages award is excessive and was due to bias, passion, prejudice,

corruption or other improper motive and that the award exceeds the amount necessary to deter and punish.

The parties in this case were all represented by able counsel who represented their clients in a competent manner. The jury represented a fair cross section of the community based upon the factors of race, age, and gender. During the course of deliberations, the jury requested additional instructions and deliberated several hours before reaching its verdicts in favor of the Plaintiffs and Ford Motor Credit Company. The jury was polled and each juror responded that the verdicts were their verdicts. The Court is satisfied that the jurors carried out their duties in a conscientious manner and that, except for the question of excessiveness of the mental anguish awards, the verdicts in this case were rendered by a properly functioning jury. There was no evidence before the Court of any misconduct, bias, passion, prejudice, corruption, or improper motive by the jury. The Court considers the fact that the jury returned a verdict of $635,000.00 in favor of Ford Motor Company's wholly owned subsidiary Ford Motor Credit Company, significant. It means the jury considered the law and evidence pertaining to the all parties.

Mental Anguish

The authority of this Court to grant remittitur pursuant to Alabama Rules of Civil Procedure, 59(f), depends upon the holding that the presumption of correctness of the jury verdict has been overcome by a clear showing that the amount of the verdict is excessive. In considering the excessiveness of the verdict, each case is determined on its own facts and the Court may not substitute its judgment for that of the jury. *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989), *City Bank of Alabama* v. *Eskridge*, 521 So. 2d 931 (Ala. 1988, and *Hammond* v. *City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). A jury's verdict must be within the bounds of reason, as perceived by the judicial mind, although it may exceed, or be less than, what any particular judge's life experience would have it be. *Big B, Inc.* v. *Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993).

The jury awarded damages for mental anguish to Samuel R. Foster, II, in the amount of $2,500,000.00. The jury returned a verdict awarding damages for mental anguish in favor of Dee-Witt

C. Sperau in the amount of $1,000,000.00. The jury heard testimony of the Plaintiffs, Plaintiffs' wives, and Plaintiff Foster's father which related to the Plaintiff's humiliation, shame, and wounded pride. There was some additional evidence before the jury from which it could be inferred that Plaintiff Foster's humiliation and shame would be greater than Plaintiff Sperau's, because of his reputation, and because of additional family relationships being affected. Neither Plaintiff presented evidence of any need for counseling or mental health care or that either Plaintiff was unable cope with the stress and grief resulting from their situation. No evidence was presented from any expert or healthcare professional that either Plaintiff was suffering from a serious emotional disorder as a result of their experiences.

Plaintiffs wish to rely on the fact that substantial amounts of monies were involved which justify the enormous award for mental anguish. This Court does not believe the amount of money involved is the guiding factor in determining the amount of mental anguish, rather the feelings and mental condition of the Plaintiff should be guiding factor. Indeed, the loss of a single weekly or monthly paycheck to a person of insubstantial means may cause as much mental anguish as a multi-million dollar loss would to one of substantial means. Also, a person of substantial means, with a good education, and with broad business experience may be better able to handle the frustration than one who was not so educated and experienced. This Court also notes that there were other factors in evidence which could have exerted a certain amount of mental suffering on these Plaintiffs which was unrelated to the actions of the Defendants.

These Plaintiffs filed suit three months after River City Ford closed its doors and in view of the scant evidence of mental anguish or suffering by both Plaintiffs, the awards totalling $3.5 million for mental anguish are excessive and should be remitted. This court considers that a remittitur of excessive damages for mental anguish by this court is warranted and justified by similar action taken by the Supreme Court of Alabama on compensatory damage awards involving mental anguish in the cases of *Sears, Roebuck and Co.* v. *Harris*, 630 So. 2d 1018, 1034 (Ala. 1993) and *Foster* v. *Life Insurance Co.*, __ So. 2d __, 28 A.B.R. 1152 (Ala. Jan. 14, 1994).

In short, the Court is shocked by the size of the verdicts for mental anguish in view of the evidence presented at the trial. This Court considers $100,000.00 would be adequate for Sperau and $250,000.00 would be adequate for Foster. However, the Court considers that a properly functioning jury could have awarded a maximum of $200,000.00 for mental anguish to Plaintiff Sperau and a maximum of $500,000.00 for mental anguish to Plaintiff Foster.

Punitive Damages

Commenting on April 28, 1994 this Court conducted a hearing to consider the excessiveness of the $6 million punitive damages awarded in this case in accordance with *Hammond* v. *City of Gadsden*, 493 So. 2d 1374, (Ala. 1986); *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223-224 (Ala. 1989); and the provisions of Section 6-11-23(b), *Code of Alabama*, 1975.

This Court has determined that the punitive damage verdict rendered in this case is not due to bias, passion, prejudice, corruption, or other improper motive. Notwithstanding the fact that an award of punitive damages is made by a properly functioning jury, it may nevertheless be excessive if it exceeds the amount necessary to accomplish the purposes of punitive damages. The purpose of a punitive damage award is not to compensate the Plaintiffs but the focus is on punishing the wrongdoer and deterring others from committing similar wrongs in the future. *Green Oil*, supra, 539 So. 2d at 222. Ford contends that the punitive damage award in this case exceeds the amount necessary to accomplish these purposes.

The issue to be decided, then, is whether under the facts of this case the punitive damage award of $6 million exceeds an amount that will punish the Defendant and deter the Defendant and others from committing similar wrongs in the future. The constitutional protection of the jury's award of punitive damages may only be disturbed if it is so excessive or out of proportion to the wrong committed by the Defendant as to violate the Defendant's rights not to be deprived of property without due process of law. *Henderson* v. *Alabama Power Company*, 627 So. 2d 878, 893 (Ala. 1993).

The Alabama Supreme Court and the Legislature have identified several non-exclusive factors which this Court may consider bearing on its question of the excessiveness of a punitive damages award. In considering these factors it is the decision of this Court that a punitive damages award of $6 million in this case is not excessive. In making its decision this Court has considered each of the numerous factors suggested by the Alabama Supreme Court in its decisions and the Alabama Legislature in its statute. The Court has also considered the United States Supreme Court's recent decisions in *Haslip* and *TXO* considering pertinent factors. In accordance with the procedure established in *Hammond*, the reasons for declining to disturb the jury's punitive damage award are stated hereinafter.

There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama. Accordingly, this Court finds that the actual harm suffered by the Plaintiffs due to the Defendants' fraudulent conduct and its duration supports the jury's punitive damages award in this case.

There was also evidence from which the jury could determine, by a clear and convincing standard, that the deception of the Plaintiffs was committed with Ford's knowledge of the financial condition of the Plaintiffs, their degree of experience, the profitability and loss experience of black dealers participating in the Minority Dealer Program under circumstances similar to the Plaintiffs, and the economic impact the failure of the dealership would have on the Plaintiffs. Having considered the evidence bearing on the issue of the intentional misconduct engaged in by Ford with regard to the Plaintiffs, this Court finds that such evidence supports the amount of punitive damages awarded by the jury.

This Court has considered the issue of the impact of the punitive damages verdict on innocent third parties. Ford emphasizes its good intentions in recruiting black dealer candidates to participate in its Minority Dealer Program. Ford suggests that the punitive damages verdict in this case will have a detrimental

effect on this Program and those participating now in the Program and those candidates who would participate in the Program in the future. During the *Hammond* hearing, this Court heard testimony from the Ford executive responsible for the Minority Dealer Program that to provide negative information to black dealer candidates would discourage their participation in Ford's Program.

There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive based upon facts known to Ford. Other evidence provided, by a clear and convincing standard, a rational basis for the jury's punitive damages award. At the same time Ford management was aggressively recruiting black dealer candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers.

Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, the end of meeting an extremely aggressive black dealer count does not justify the perpetration of an intentional fraud. This Court is also not persuaded that Ford's only alternative to suits of this nature is to stop its minority program. Disclosure of the failure rate of "all" new dealers along with a disclosure of the cyclical nature of the business would certainly be a start toward correcting the problems complained of here.

Another of the factors to be considered is whether the Defendant profited or received a benefit from its misconduct. Ford derived a substantial benefit from its recruitment of black dealer candidates including the Plaintiffs. Ford management stated in the October, 1987 Equal Opportunity Progress Report that is black dealerships had sales of Ford products amounting to $1 billion. The corporate benefit of the black dealer body in dollars to Ford is significant. The Plaintiffs point out that River City Ford sold approximately $15 million in Ford products. They also maintain that the black dealer program provided Ford the added benefits of positive corporate image and a means of keeping dealerships in less desirable geographic locations in business.

Ford's 1993 Form 10-K indicates that Ford Motor Company had an annual net income of approximately $2.5 billion for 1993 and assets approaching $200 billion. Additionally, Ford management testified during the *Hammond* hearing that the $6 million punitive damages award will have no effect on Ford's continued operation. This Court also notes that the United States Supreme Court affirmed a punitive damages award of a West Virginia jury in the amount of $10 million against TXO. In *TXO* the Plaintiff estimated that TXO had a net worth of between $2.2 billion and $2.5 billion, a net worth equivalent to Ford Motor Company's net income for 1993. *TXO Production* v. *Alliance Resources*, 125 L. Ed. 2d 366, 374 n.9 (1993).

A $6 million punitive damages verdict against Ford Motor Company is not excessive under the facts of this case, given the financial position of Ford Motor Company. This is particularly so when the $6 million punitive damage award in this case is compared to larger punitive damages awards affirmed by the Alabama Supreme Court in similar fraud cases against corporate defendants which do not have either the assets or income of Ford Motor Company.

Another factor considered in sustaining the jury's punitive damages award is the Plaintiffs' costs of litigation. Plaintiffs expended considerable resources in time and money to prepare and try this case. A reduction of the jury's punitive damages award in this case would discourage plaintiffs undertaking such litigation due to the substantial costs required.

Based on the foregoing, it is ORDERED:

1. Ford's Motion for Judgment Notwithstanding the Verdict is DENIED;

2. Ford's Motion for New Trial is DENIED;

3. However, the Court grants a new trial unless the Plaintiffs accept a remittitur as to the mental anguish award, to $200,000.00 for Sperau and $500,000.00 for Foster;

4. Under the *Hammond* - *Green Oil* factors, the Court concludes that the amount of punitive damages awarded are

presumptively correct and Ford's Motion for Remittitur with respect thereto is DENIED; and

5. Ford Motor Credit Company's judgment against Sperau, Foster, and Ms. Sperau, which Plaintiffs have not challenged, is not affected by these rulings.

DONE this the 29 day of June, 1994.

/s/
H. Edward McFerrin
CIRCUIT JUDGE

APPENDIX D

IN THE SUPREME COURT OF ALABAMA
January 23, 1998

1931473

Dee-Witt C. Sperau, et al. v. Ford Motor Company, et al. (Lowndes: CV-91-34)

1931591

Ford Motor Company v. Dee-Witt Sperau and Samuel R. Foster, II. (Lowndes: CV-91-34)

1931629

Dee-Witt C. Sperau and Samuel R. Foster, II v. Ford Motor Company. (Lowndes: CV-91-34)

NOTICE

The application for rehearing filed in this cause on September 1, 1997, is overruled. No opinion written on rehearing.

PER CURIAM - Hooper, CJ., Almon, Shores, Kennedy and Cook, JJ., concur;
Maddox and See, JJ., dissent;
Butts, J., recuses himself.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 23 day of Jan., 1998.

/s/
Clerk, Supreme Court of Alabama

APPENDIX E

Rule 29.6 STATEMENT

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%:

Associates First Capital Corporation
The Hertz Corporation

Argentina
Invercred Compania Financiera S.A.

Australia
Ford Motor Company of Australia Limited

Belgium
Ford Motor Company (Belgium) N.V.

Brazil
Autolatina Comercio e Participacoes Financerias Ltd.

Denmark
Ford Motor Company A/S

Finland
Oy Ford Ab

Germany
Ford Werke-Aktiengesellschaft

Holland
Ford Nederland B.V.

Japan
Mazda Motors Corporation

Korea
Ford Motor Company of Korea

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

Switzerland
Ford Motor Company (Switzerland) S.A.

Vietnam
Ford Vietnam Limited

Supreme Court, U.S.
FILED
MAR 20 1998
CLERK

No. 97-1391

In The

Supreme Court of the United States

October Term, 1997

FORD MOTOR COMPANY,

Petitioner,

v.

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Dee-Witt C. Sperau and Samuel R. Foster, II, respectfully submit this brief in opposition to the petition of Ford Motor Company ("Ford") for a writ of certiorari to review the judgment of the Supreme Court of Alabama rendered pursuant to its decision of September 5, 1997.

STATEMENT

On June 9, 1995, the Supreme Court of Alabama issued its per curiam opinion in this case, which affirmed a $6 million punitive damages verdict in favor of the respondents and against Ford on respondents' intentional fraud and deceit claims arising under Ala. Code 1975, §§ 6-5-101 through 6-5-104. *Sperau v. Ford Motor Company*, 674 So. 2d 24 (Ala. 1995).[1]

On September 25, 1995, Ford paid respondents the compensatory portion of the judgment in the amount of $1,692,000.[2] The judgment included compensatory awards for economic damages and damages for personal

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[1] The opinion is reproduced and designated Appendix B of Ford's petition at 32a-66a.

[2] Ford Motor Credit Company's judgment against the respondents in the amount of $635,000 was satisfied contemporaneously. Respondents did not contend at trial that their economic damages included the $635,000 debt claimed by Ford Credit as Ford has previously claimed on rehearing before the Supreme Court of Alabama. R. 2013-2015 (closing argument).

injury due to mental anguish caused by Ford's commission of intentional fraud and deceit against respondents.

In its opinion of June 9, 1995, the Supreme Court of Alabama rejected Ford's arguments that respondents' claims were not supported by sufficient evidence and that respondents' damages were not proximately caused by Ford. Pet. App. B, 43a-57a. The court also rejected Ford's race-based-theory argument both on the merits and on waiver in failing to assert a federal preemption defense. Pet. App. B, 51a.

In paying the compensatory portion of the judgment, Ford has also waived any challenge of the Supreme Court of Alabama's findings on the issues of sufficiency of the evidence and proximate cause. Consequently, Ford's reference to "[r]espondents' [m]ismanagement of the [d]ealership" is not relevant to any issue which Ford has preserved. Pet., 9. Secondly, Ford's partial satisfaction of the judgment waived Ford's contention that the judgment is based on a theory not presented to the jury. Pet., 18. This contention is waived for the reason that the respondents' causes of action for legal fraud and deceit were the very same "legal theories" supporting the judgment for compensatory as well as punitive damages. Ford failed to preserve, and has affirmatively waived, any challenge to the legal theory on which the judgment for compensatory and punitive damages was based. Finally, Ford's payment of the compensatory portion of the judgment constitutes a legal admission by Ford that it inflicted both economic and personal injury on the respondents, which was done intentionally through affirmative acts of misconduct for

which Ford was subject to punitive damages under Ala. Code 1975, § 6-11-20.

On May 28, 1996, this case was remanded to the Supreme Court of Alabama by order of this Court, "for further consideration in light of *BMW of North America, Inc. v. Gore*, 517 U.S. ___ (1996)." *Ford Motor Company v. Sperau*, No. 95-771.

On September 5, 1997, the Supreme Court of Alabama issued its per curiam opinion pursuant to this Court's remand order.[3]

In its first opinion of June 9, 1995, the Supreme Court of Alabama unanimously held that this case was appropriate for the imposition of punitive damages under Alabama law, although the dissenting justices differed with the majority as to the appropriate amount of punitive damages. In the opinion of September 5, 1997, the Supreme Court of Alabama again unanimously agreed that this case was appropriate for the imposition of punitive damages under Alabama law, although once again the court was divided as to an appropriate amount. The Supreme Court of Alabama affirmatively stated that it complied with this Court's mandate to reconsider the question of the excessiveness of the punitive damages judgment in this case in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). Pet. App. A, 6a. Having reviewed this case in compliance with this Court's mandate, the Supreme Court of Alabama affirmed the punitive judgment on the condition that

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[3] The opinion is reproduced and designated Appendix A of Ford's Petition at 1a-31a.

respondents accept a remittitur of $4,208,000. Pet. App. A, 23a.

On September 24, 1997, respondents filed their acceptance of remittitur of punitive damages to the sum of $1,792,000. On January 23, 1998, the court gave notice that Ford's application for rehearing filed September 1, 1997 was overruled. Pet. App. D, 76a. The certificate of judgment of affirmance was issued by the Supreme Court of Alabama on February 10, 1998.

REASONS FOR DENYING THE WRIT

1. There Are No Compelling Reasons For Granting A Writ In This Case.

Ford invokes the jurisdiction of this Court seeking the issuance of a writ of certiorari pursuant to 28 U.S.C. § 1257(a). However, the punitive damages judgment in this case was rendered with due process of law under the Fourteenth Amendment of the United States Constitution as most recently interpreted by this Court. This Court's mandate of May 28, 1996 required the Supreme Court of Alabama to consider this case in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *Ford Motor Company v. Sperau*, No. 95-771. The Supreme Court of Alabama's decision of September 5, 1997 was done in compliance with this Court's mandate of May 28, 1996. Pet. App. A, 6a.

Ford's challenge to the judgment of the Supreme Court of Alabama is no more than baseless allegations

that the court made erroneous factual findings and misapplied properly stated rules of law. Even assuming that Ford's petition is factually and legally correct, which it is not, it raises issues of the type for which a writ of certiorari is rarely granted. Rules of the United States Supreme Court, Rule 10. Ford's petition presents no compelling reason making this case such a rare exception. To the contrary, Ford's petition is merely a motion for remittitur under the guise of a petition.

Ford's contention that it had no notice of the legal theory on which the case was tried is without merit and frivolous. The judgment in this case was based upon Ala. Code 1975, §§ 6-5-101 through 6-5-104 and legal precedents of the Supreme Court of Alabama construing these statutory provisions. The foregoing legal theories on which respondents based their case both at trial and on appeal did not vary. The affirmance of the judgment based upon these legal theories presents questions purely of Alabama law decided by the Supreme Court of Alabama. Additionally, Ford has waived any issue concerning the legal theory on which the judgment was based by payment of the compensatory portion of the judgment and by failure to affirmatively plead federal preemption.

Ford's allegation that the imposition of punitive damages in this case violates Ala. Code 1975, § 6-11-20 is false. The Supreme Court of Alabama specifically found clear and convincing evidence in this case that "Ford 'consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff[s],' § 6-11-20(a), Ala. Code 1975. . . . " Pet. App. A, 6a. This finding presents purely a question of Alabama law decided by the Supreme Court of Alabama. Also, Ford's

payment of the compensatory portion of the judgment constitutes a legal admission by Ford that it intentionally inflicted economic and personal injury on the respondents warranting the imposition of punitive damages pursuant to Ala. Code 1975, § 6-11-20.

2. Ford's Liability Is Based Upon The Law And Evidence Presented To The Jury.

The genesis of Ford's post-hoc-theory argument is manifested in the following excerpt from the opinion of June 9, 1995:

> Ford also claims that even if the plaintiffs have adduced sufficient evidence to support their misrepresentation and suppression claims, the theory upon which those claims rest, conflicts with federal law and is therefore preempted under the Supremacy Clause of the United States Constitution. Ford claims that an award of damages under state common law may be subject to conflict preemption if it effectively requires behavior that would be prohibited under federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Ford argues the plaintiffs' claims boil down to the contention that Ford should have inflated the capital requirement and concomitantly reduced the projected return on investment because Foster is an African-American. Ford contends that this verdict would require Ford to do precisely what 42 U.S.C. § 1981 prohibits, offer dealerships to black applicants on less favorable terms than are offered to white applicants.
>
> We reject this contention, because it is premised upon an erroneous characterization of the

> verdict in this case as requiring a higher capitalization for a black dealership than a white dealership. The verdict in this case was based upon the plaintiffs' state action for fraud. The fraud claim is not preempted by federal law. In addition, Ford's preemption argument was never raised in the trial court, and thus has been waived. Federal preemption must be affirmatively pleaded in order to avoid waiver. *International Longshoremen's Ass'n v. Davis*, 470 So. 2d 1215 (Ala. 1985).

Pet. App. B, 51a.

The court on remand of the case again rejected Ford's race-based-theory argument in its opinion of September 5, 1997. Pet. App. A, 8a-11a. Ford's post-hoc-theory argument was first raised in its September 1, 1997 application for rehearing. This frivolous argument is an obvious effort by Ford to resurrect a claim which has been waived and which was without merit from inception.

Ford cites a number of federal criminal cases for the proposition that "a defendant must have notice of the claim against it in order to be able to defend against them." Pet., 18. However, this is not a criminal case to which strict constitutional safeguards afforded to criminal defendants apply as is suggested by Ford. *See BMW, supra*, 116 S. Ct., at 1598, n. 22. Nevertheless, Ford's contention that it had no notice of the claims on which the judgment was rendered in this case is demonstrably false.

This was not a case of trial by ambush as Ford would have this Court believe. Respondents' complaint, as amended, stated claims against Ford for fraud and deceit.

C. 357-359, *e.g.*[4] The parties conducted extensive pretrial discovery, including the production of voluminous documents and the deposition of witnesses and experts, amounting to several thousand pages. Ford was provided a detailed exhibit list identifying 711 trial exhibits before trial, which included those exhibits admitted at trial. C. 1167-1215. The trial court considered the law, facts and arguments concerning the claims in this case through summary judgments supported by several hundred pages of briefs and submissions addressing every issue conceived by the parties.

The pretrial order recited respondents' claims against Ford of misrepresentation and suppression of material facts regarding capitalization of the dealership and the sales and profit forecast. C. 3825-3827. The pretrial order specifically stated that "plaintiffs' legal fraud claims are made pursuant to Ala. Code 1975, §§ 6-5-101 through 6-5-104." C. 3829. The pretrial order also provided Ford specific notice that respondents claimed compensatory and punitive damages due to the legal fraud practiced upon them by Ford. C. 3829.

The jury was instructed on the law applicable to plaintiffs' claims pursuant to Ala. Code 1975, §§ 6-5-101 through 6-5-104, including charges on willful misrepresentation, reckless misrepresentation, deceit, and fraudulent suppression. C. 2087-2089. Ford did not object to any of the instructions given by the trial court regarding the

---

[4] "R. ___ " refers to the Reporter's Transcript; "C. ___" refers to the Clerk's Record.

law applicable to plaintiffs' claims or damages, but rather Ford concurred that the charges were correct statements of Alabama law. R. 2106. This case was tried, the jury was charged, and the verdict and judgment were based on the same theories of law applied throughout the case, as is proper under Alabama law. *See, e.g., City of Dothan v. Gulledge*, 276 Ala. 433, 163 So. 2d 217, 218-19 (1964) (Although relied on by Ford in its brief on rehearing, this case was one tried and argued on appeal on the same legal theory, just as is true of the respondents' case.).

Contrary to Ford's argument on this point, there was no limitation on contentions, arguments or reasons which respondents could assert in support of the judgment on appeal before the Supreme Court of Alabama, provided that these were based on the legal theories charged, and that the same were supported by the evidence. *See Beavers v. County of Walker, Alabama*, 645 So. 2d 1365, 1372 (Ala. 1994) ("However, 'the rule requiring adherence to the theory relied on below . . . does not mean the parties are limited in the appellate court to the same reasons or arguments advanced in the lower court upon the matter or question in issue.' *Home Indemnity Co. v. Reed Equipment Co.*, 381 So. 2d 45, 50 (Ala. 1980)").

Ford's post-hoc-theory argument fails to distinguish between contentions (which, like arguments of counsel, are not the law or evidence of the case), and instructions on the law of the case arising under Ala. Code 1975, §§ 6-5-101 through 6-5-104. Many contentions were raised by the parties in the course of the trial which were based upon the law of the case. The jury had the discretion to accept or reject these contentions and apply the law to the facts as it saw fit. But in any event, the respondents'

contentions in this case were by no means limited exclusively to the contention that Ford suppressed material facts contained in documents, including Ford's Equal Employment Opportunity Reports, which is the crux of this argument. Respondents' contentions also included claims of intentional misrepresentation and deceit, among others.

Ford's post-hoc-theory argument also fails for the reason that the compensatory portion of the judgment was paid on September 25, 1995. It is implausible that Ford voluntarily paid the compensatory portion of a judgment which it now contends was based upon claims that were not presented to the jury. Ford's argument in this regard is not only post hoc, but it is also disingenuous. As previously stated, the judgment for compensatory and punitive damages in this case arises from the same legal claims. By payment of the compensatory portion of the judgment, Ford has waived any challenge to the judgment on the basis of an alleged lack of adequate notice of the respondents' legal claims.

3. Ford Had Fair Notice Under Alabama Law That It Was Subject To The Imposition Of Punitive Damages In This Case.

The Supreme Court of Alabama specifically found clear and convincing evidence in this case that "Ford 'consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff[s],' § 6-11-20(a), Ala. Code 1975. . . . " Pet. App. A, 6a. The Supreme Court of Alabama is the only court which may

authoritatively construe this Alabama statute. *BMW, supra*, 116 S. Ct., at 1600.

Among the grounds asserted by Ford in its JNOV motion is the following ground pertinent to this discussion: "There is a lack of clear and convincing evidence that the Defendant Ford consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to either of the Plaintiffs so as to warrant a jury verdict for punitive damages." C. 3901, ¶ 12. Ford correctly acknowledged that punitive damages could be imposed under § 6-11-20 upon a finding of clear and convincing evidence that Ford had consciously or deliberately engaged in either oppression, fraud, wantonness, *or* malice, as those terms are defined under the statute. *See, e.g., Motion Industries, Inc. v. Pate*, 678 So. 2d 724, 733-34 (Ala. 1996) (Applying § 6-11-20 in retaliatory discharge case). As the following discussion shows, there were several alternative grounds making the imposition of punitive damages appropriate under Ala. Code 1975, § 6-11-20 in this case.

In its order denying Ford's JNOV motion, the trial court made the following specific findings:

> "There was evidence from which the jury could find, by a clear and convincing standard, that Ford Motor Company committed fraud against the Plaintiffs in inducing them to incur debt in excess of $1 million in order to acquire and operate a Ford dealership in Selma, Alabama. Accordingly, this Court finds that the actual harm suffered by the Plaintiffs due to the Defendant's fraudulent conduct and its duration supports the jury's punitive damages award in this case.

"There was also evidence from which the jury could determine, by a clear and convincing standard, that the deception of the Plaintiffs was committed with Ford's knowledge of the financial condition of the Plaintiffs, their degree of experience, the profitability and loss experience of black dealers participating in the Minority Dealer Program under circumstance similar to the Plaintiffs, and the economic impact the failure of the dealership would have on the Plaintiffs. Having considered the evidence bearing on the issue of the intentional misconduct engaged in by Ford with regard to the Plaintiffs, this Court finds that such evidence supports the amount of punitive damages awarded by the jury.

. . .

"There was evidence from which the jury could find, by a clear and convincing standard, that Ford defrauded the Plaintiffs by using sales and profit forecasts and capitalization requirements which were deceptive based upon facts known to Ford. Other evidence provided, by a clear and convincing standard, a rational basis for the jury's punitive damages award. At the same time Ford management was aggressively recruiting black dealer candidates, including Samuel R. Foster, II, with sales and profit forecasts showing returns on investment of 65.4%, Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers.

"Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, the end of meeting an

> extremely aggressive black dealer count does not justify the perpetration of an intentional fraud. . . . "

C. 4108-4110; Pet. App. C, 72a-73a.

Ford intentionally misrepresented material facts in order to induce the respondents to incur substantial debt, with full knowledge of their financial vulnerability. As stated by the Supreme Court of Alabama, "[G]iven Ford's knowledge of the plaintiffs' limited personal wealth in relation to the large amounts they had to borrow to invest, Ford was aware not only that the plaintiffs' ran a substantial risk of losing their investment, but also that they might face complete financial ruin if the dealership failed." Pet. App. A, 8a.

For many years preceding this action, Alabama law had recognized that a person possesses a legal right to the accurate and full disclosure of material facts under the circumstances presented in this case. Ala. Code 1975, §§ 6-5-101 through 6-5-104. Ford's intentional commission of fraud and deceit against respondents as charged under Ala. Code 1975, §§ 6-5-101 through 6-5-104, supports a determination that Ford intentionally deprived respondents of their legal right to the full and accurate disclosure of material facts. Ala. Code 1975, § 6-11-20(b)(1) (Defining "fraud" under § 6-11-20(a) to include intentional misrepresentation or deceit done with the defendant's intention of depriving a person of "legal rights."). Prior Alabama law fairly indicated that punitive damages could be imposed in this case. *See Ford Motor Company v. Sperau*, Pet. App. A, 6a-7a, n. 1 (Text and authorities discussing imposition of punitive damages for intentional fraud and deceit under Alabama law). *See also, TXO*

Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 464, 113 S. Ct. 2711, 2724 (1993) ("[T]he notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct. *Haslip*, 499 U.S., at 24, n. 12, 111 S. Ct., at 1046, n. 12. Prior law, in West Virginia and elsewhere, unquestionably did so.").

Respondents contended and proved that Ford intended to cause them harm by inducing them through intentional fraud to acquire the Selma Ford dealership and to incur over $1 million of debt related thereto. The jury was properly charged and awarded compensatory damages of $992,000 due to Ford's intentional misconduct causing the creation of this debt. R. 2102-2103. Also, the jury was charged and awarded compensatory damages for personal injury due to mental anguish caused by Ford's willful fraud. R. 2087, 2104. Ford paid the compensatory portion of the judgment on September 25, 1995, thereby admitting that it had consciously or deliberately caused economic damage and personal injury due to its intentional misconduct. The damages suffered by the respondents were due to Ford's intentional misconduct "otherwise causing injury." Ala. Code 1975, § 6-11-20(b)(1).

Section 6-11-20 also provides that punitive damages may be awarded in a tort action where there is clear and convincing evidence that the defendant consciously or deliberately engaged in malice with regard to the plaintiffs. The statute defines "malice" to include "[t]he intentional doing of a wrongful act without just cause or excuse . . . [u]nder such circumstances that the law will

imply an evil intent."Ala. Code 1975, § 6-11-20(b)(2). Ford's commission of an intentional fraud under the facts of this case proved by clear and convincing evidence that Ford consciously or deliberately engaged in conduct under circumstances in which Alabama law implies an evil intent. Alabama law has traditionally placed the commission of an intentional fraud and deceit in this category. *See* text and citation of authorities at Pet. App. A, 6a-7a, n. 1.

The evidence also supports a determination that Ford engaged in "oppression" in light of the substantial mental anguish and economic hardship caused by Ford's intentional misconduct. "Oppression" is defined under the subject statute as "[s]ubjecting a person to cruel and unjust hardship in conscious disregard of the person's rights." Ala. Code 1975, § 6-11-20(b)(5).

Ford not only had notice that punitive damages could be imposed under § 6-11-20 for intentional misconduct, but Ford also had notice that sanctions in the amount imposed in this case could be awarded under the private remedy provisions of the Deceptive Trade Practices Act ("DTPA"), Ala. Code 1975, § 8-19-10. As the Supreme Court of Alabama stated, Ford specifically advocated the applicability of the DTPA "as providing due process notice of the severity of the possible punishment." Pet. App. A, 17a. It follows, then, that in light of Ford's own argument, Ford had actual notice that damages in the amount assessed could be imposed under § 8-19-10 of the DTPA for the intentional misconduct found in this case. The punitive damages award in this case, as remitted, is consistent with the legislatively sanctioned private remedy provided under the very statute

relied upon by Ford. Accordingly, the Supreme Court of Alabama's remittitur of punitive damages to an amount based upon § 8-19-10 of the DTPA, must meet even Ford's own notions of fair notice. Pet. App. A, 17a-19a, 23a.

4. The Punitive Damages Award In This Case Is Not Grossly Excessive In Light Of *BMW*.

The Supreme Court of Alabama has twice unanimously decided that this case is appropriate for the imposition of punitive damages under Alabama law. Dissatisfied with the court's $4,208,000 remittitur of punitive damages (a reduction of slightly more than 70%), Ford petitions this Court for a writ of certiorari, which petition amounts to nothing more than just another motion for remittitur under another label. Ford's petition evidences that Ford and others would relegate this Court to the role of conducting de novo reviews of every state court punitive damages case, and of entertaining every motion for remittitur of state court punitive damages awards filed under the guise of a petition. Pet., 17, n. 11 (Ford's discussion of and reference to other Alabama cases remanded for consideration "in light of *BMW*" in which petitions are now pending or anticipated).

In its September 5, 1997 opinion, the Supreme Court of Alabama stated the issue before the court as follows: "The question before us is whether the $6 million punitive damages award assessed against Ford Motor Company is excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, in light of the guidelines established by the Supreme Court of the United States in *BMW of North America, Inc.*

v. Gore, 517 U.S. 559, 116 S. Ct. 1589." Pet. App. A, 1a. The court specifically stated that its reconsideration was in compliance with this Court's mandate of May 28, 1996. *Id.*, at 6a. A review of the opinion confirms that such is the case.

The first *BMW* factor considered by the court was the degree of reprehensibility. Pet. App. A, 7a-14a. In regard to the reprehensibility factor, the court concluded that the degree of reprehensibility in this case supported "a significant punitive damages award." *Id.*, at 13a. The second *BMW* factor addressed by the court was the ratio of punitive damages to the actual or likely harm. *Id.*, at 14a-15a. The court determined that "the ratio should not be much greater than 1:1." *Id.*, at 15a. Finally, the court reviewed sanctions for comparable misconduct. *Id.*, at 15a-19a. The court concluded that "the statutory maximum liability that would potentially exist under the DTPA's [Deceptive Trade Practices Act's] private right of action in this case does provide an amount that can be meaningfully compared to the punitive damages award. . . . [T]he maximum *total recovery* permitted for a violation of the DTPA under the private right of action of § 8-19-10, treble damages plus costs and reasonable attorney fees, would be somewhat over $3 million." *Id.*, at 19a.

Having considered these *BMW* factors, among others, the court affirmed the judgment conditionally on respondents' accepting a remittitur of $4,208,000. *Id.*, at 19a. On September 24, 1997, respondents accepted the remittitur of punitive damages, and the court issued its certificate of affirmance of judgment on February 10, 1997. The

punitive damages award as remitted is not grossly excessive in light of *BMW*.

CONCLUSION

Based upon the facts, law and argument presented herein, Ford's petition for a writ of certiorari is due to be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

FORD MOTOR COMPANY, PETITIONER

v.

DEE-WITT SPERAU AND SAMUEL R. FOSTER, II,
RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

We argued in the petition that either summary reversal or plenary review is warranted in this case because the Alabama Supreme Court evaded its obligation to apply the principles enunciated by this Court in *BMW* and, in so doing, violated Ford's due process rights in three distinct ways. Respondents fail to join issue on the merits of our arguments, instead relying on misguided theories of waiver and on state case law that has no bearing on the federal constitutional issues we have raised. The transparent inefficacy of their arguments serves to underscore the appropriateness of review in this case.

A. The Alabama Supreme Court Deprived Ford Of Due Process By Justifying Liability On The Basis Of A Theory That Was Not Presented To The Jury.

As explained in the petition (at 18-20), the Alabama Supreme Court renounced the race-based theory of liability upon which the case was tried and the jury was instructed and instead upheld liability and $1.8 million of punitive damages on the basis of what a dissenting Justice aptly termed a "post hoc 'race-neutral' rationalization" (Pet. App. 29a n.11 (See, J., dissenting)) — namely, that the sales and profit forecast provided to respondents was misleadingly optimistic given the performance history of the prior owner and respondents' status as new dealers. This violated due process, we argued, because Ford had inadequate notice of the latter theory of liability, which was neither the focus of respondents' evidence nor even obliquely referred to in their theory-of-the-case instruction and hence could not conceivably have been the basis of the jury's verdict.[1]

---

[1] Respondents state (Opp. 7) that we first raised this issue in our application for rehearing. Of course, that is the first time we could raise it, since it was not until the Alabama Supreme Court changed the theory of liability in its opinion on remand that the issue came into existence.

Respondents do not deny that the Alabama Supreme Court changed the theory of liability after the case had been tried and decided. Instead, citing only Alabama case law, they contend (Opp. 7-10) that Ford was entitled to no more notice than that they would be pursuing a fraud claim relating to capitalization of the dealership and the sales and profit forecast. As we explained in the petition, however, more is required as a matter of federal constitutional law. Several of the cases we cited involved a post hoc effort to change, not the subject matter of the case, but the ***theory*** of liability. For example, in *Chiarella v. United States*, 445 U.S. 222 (1980), a case involving a printer's acquisition of stock in a company that he had deduced was about to be the target of a takeover, there was no change to either the statutory basis for prosecution — Section 10(b) of the Securities Act of 1934 — or the characterization of the printer's conduct as securities fraud by means of trading while in possession of inside information; what did change was the government's theory of liability for that type of fraud. The jury was instructed based on the theory that the printer had violated a duty he owed to those from whom he purchased stock of the target company, and the government sought to sustain the conviction based on the theory that he had violated a duty he owed to the acquiring corporation. This Court held that due process prohibited that kind of after-the-fact change in theory. *Id.* at 235-237. The present case is indistinguishable.

Respondents suggest (Opp. 7) that the cases upon which we rely are inapposite because they involve criminal prosecutions. But one of the cases — *Spevack v. Klein*, 385 U.S. 511 (1967) — is a civil case. The *Spevack* Court indicated not the slightest reluctance to apply the prohibition against post hoc changes in theory. Moreover, respondents offer no reason why the logic underlying the notice requirement in criminal cases should not apply in the civil context, particularly when, as here, the quasi-criminal remedy of punitive damages is implicated. Certainly, the Due Process

Clause applies to civil cases; and certainly the requirement of notice and opportunity to defend is about as fundamental a due process protection as there is.

True, in *BMW* this Court stated, with apparent reference to the provisions of the Sixth Amendment, that "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases." 116 S. Ct. at 1598 n.22. It went on, however, to stress that "the basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*." *Ibid.* (emphasis in original; citation omitted). It thus freely applied principles developed in criminal cases to support its pronouncements in *BMW*. See, *e.g.*, *id.* at 1597 & n.19 (citing criminal case for proposition that States may not impose punitive damages for conduct that was not illegal where it occurred); *id.* at 1598 & n.22 (citing criminal cases for proposition that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose"); *id.* at 1599 & n.24 (citing criminal case for proposition that punitive damages should be proportionate to the degree of reprehensibility of the conduct). Accordingly, the Court should not permit the punitive damages to stand when they can be justified only on a theory never tried to the jury.

Even putting the punitive damages aspect of this case aside, there is neither a textual nor a logical basis for contending that the notice component of the Due Process Clause does not apply in civil damages actions. We think it inconceivable, for example, that this Court would hold that a defendant could be found liable on the ground that its product was defectively designed when the sole claim considered by the jury was inadequacy of warnings. If there be any doubt on this point, that makes the instant case all the more worthy of review.

Finally, respondents assert (Opp. 10) that, by paying the compensatory damages, Ford somehow waived this argument. They neglect to mention that the parties specifically agreed that payment of the compensatory portion of the judgment would not "constitute[] the waiver * * * of any right which either [party] may now have * * *." Agreement ¶ 9 (Sept. 25, 1995). In any event, because Ford paid the compensatory damages before the Alabama Supreme Court changed the theory of liability, the payment could not possibly constitute a waiver of an issue that had not yet arisen. Moreover, we are aware of no case (and respondents certainly have not cited one) holding that payment of a judgment waives the right to challenge it on appeal. In the absence of a stay (which the Alabama Supreme Court had denied), respondents could have executed on their judgment. Ford was entitled to avoid this unpleasantness by paying the compensatory portion of the judgment and then seeking to recover that payment in the event the judgment were ultimately overturned. Respondents' frivolous waiver argument highlights their inability to make any meaningful response on the merits.

B. The Alabama Courts Deprived Ford Of Due Process By Permitting Imposition Of Punitive Damages Without Fair Notice To Ford That Its Conduct Was Subject To Punishment.

We asserted in the petition (at 21-24) that Ford's due process right to notice was violated in a second way because the Alabama courts retroactively read out of the punitive damages statute the requirement that respondents establish that Ford intended to deprive them of property or legal rights or otherwise injure them. As we noted in the petition (at 22), the Alabama Supreme Court repeatedly found — as the evidence clearly established — that Ford did not intend to deprive respondents of property or otherwise injure them. Respondents ignore this critical finding, asserting (Opp. 14) that they "contended and proved that Ford intended to cause them harm" by inducing them to purchase the assets of the

Selma dealership. Of course, bald assertions cannot trump the Alabama Supreme Court's finding. In view of that finding, the only remaining issue is whether, at the time of the events in this case, Alabama law gave Ford fair notice that well-intentioned misrepresentations or omissions could give rise to punishment. As in *Bouie* — a case that respondents do not even mention, let alone attempt to distinguish — the applicable statute was "narrow and precise" (378 U.S. at 352), permitting punitive damages only in those fraud cases in which the defendant intended to deprive the plaintiff of property or legal rights or otherwise cause injury. Alabama law accordingly gave Ford "no reason even to suspect" that its benignly motivated conduct could be subject to punishment (*ibid*).

Respondents also assert (Opp. 13) that there is a legal right not to be defrauded and that *ipso facto* there is adequate evidence that Ford deprived them of "legal rights." Such a construction of the punitive damages statute — which was neither presented to the Alabama Supreme Court during the remand proceedings nor adopted by that court — would render the intent-to-injure requirement a nullity. If the legal right to which the statute refers could encompass the right not to be defrauded, there would have been no point to requiring proof that the defendant intended to deprive the plaintiff of property or legal rights because that requirement would be met in every fraud case. Ford certainly could have had no notice at the time of its conduct that the statute might be interpreted in such a peculiar way. Accordingly, even had this argument been accepted by the Alabama Supreme Court, it would not defeat Ford's notice argument.

Respondents argue (Opp. 14-15) that the evidence was sufficient to support a finding that Ford's conduct was oppressive and malicious. Although we dispute that contention, it is irrelevant here. The requirements of the statute are conjunctive, and our argument is based on the Alabama courts' retroactive elimination of the intent-to-injure

requirement, not on their interpretation of the other prerequisites to the imposition of punitive damages.

Finally, respondents claim (Opp. 15-16) that, by citing the Deceptive Trade Practices Act (DTPA) in support of our argument that the punitive damages are disproportionate to the legislatively established fine for comparable conduct, we somehow conceded that Ford had adequate notice that its conduct could be subjected to punishment. But we have never contended that the DTPA applies to Ford's conduct. To the contrary, in the remand proceedings we specifically asserted that "Ford's conduct in this case could not conceivably be regarded to violate any criminal or regulatory statute" but that the DTPA provided "the closest analogy" for purposes of the comparative fines guidepost. Ford Motor Company's Brief on Remand at 38, *Ford Motor Co. v. Sperau,* 1997 WL 545878 (Ala. Sept. 5, 1997) (No. 1931591). That is hardly an admission that the DTPA gave Ford notice that it could be subject to punitive damages in the absence of an intent to injure.

C. The $1.8 Million Punishment Is Grossly Excessive And Therefore Violates The Due Process Clause Of The Fourteenth Amendment.

Respondents make no effort to defend the Alabama Supreme Court's treatment of the *BMW* factors. Instead, they contend (Opp. 16) that, if this Court were to grant review here, it would be relegated "to the role of conducting de novo reviews of every state court punitive damages case." Of course, this Court does not obligate itself to review every petition on a particular subject merely because it grants review in one case on that subject. Moreover, as the petition demonstrates, this is no run-of-the-mill challenge to a state court's excessiveness review. This case involves a blatant deviation from the Court's admonition that punitive damages must be proportionate to the degree of reprehensibility of the misconduct — one so egregious that a dissenting Justice

concluded that it was only by means of "forensic gymnastics" that the majority could hold the conduct to justify a near $2 million punishment (Pet. App. 29a (See, J., dissenting). Review is warranted to send a strong signal that this kind of defiance of this Court's mandate is intolerable.

Respondents also suggest (Opp. 16, 17) that review is unwarranted because the Alabama Supreme Court materially reduced the original punishment. But the issue is not where the judgment started, but rather where it wound up. Here, it wound up at a figure that cannot possibly be squared with the (exceedingly minimal) degree of reprehensibility of the conduct. Review is warranted to enunciate clearly that a punishment of close to $2 million cannot be justified when the conduct barely registers on the reprehensibility scale.

CONCLUSION

The Court should either summarily reverse the judgment of the Alabama Supreme Court or grant plenary review.

Respectfully submitted.

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